

EXHIBIT 3

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - - x

4 IRVING H. PICARD, TRUSTEE

5 FOR THE LIQUIDATION OF B.

6 vs. CASE NO. 11-02149-cgm

7 BANQUE SYZ & CO., S.A.

8 - - - - - x

9 IRVING H. PICARD, TRUSTEE

10 FOR THE LIQUIDATION OF B.

11 vs. CASE NO. 12-01205-cgm

12 MULTI-STRATEGY FUND LIMITED

13 - - - - - x

14

15 U.S. Bankruptcy Court

16 One Bowling Green

17 New York, New York 10004

18

19 May 18, 2022

20 10:01 AM

21 B E F O R E :

22 HON. CECELIA G. MORRIS

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: Unknown

1 Adversary Proceeding 11-02149-cgm, Irving H. Picard, Trustee
2 for the Liquidation of B vs. Banque XYZ & Co., SA
3 RE: Doc #148 Notice of Adjournment of Hearing RE: Pre-Trial
4 Conference Hearing not Held and Adjourned to 5/18/22 at 10
5 a.m. at Videoconference (ZoomGov) (CGM).

6
7 RE: Doc #149 Motion to Dismiss Case/Motion and Notice of
8 Motion of Defendant Banque Syz SAs Motion to Dismiss the
9 Complaint (related document(s) 147, 1) filed by Richard B.
10 Levin on behalf of Banque SYZ & Co., SA with hearing to be
11 held on 5/18/22 at 10 a.m. at Videoconference (ZoomGov)
12 (CGM) Responses due by 3/29/22

13
14 RE: Doc #153 Opposition/Trustee's memorandum of Law in
15 Opposition to Defendant Banque Syz SA's Motion to Dismiss
16 (related document(s)149) filed by Nicholas Cremona on behalf
17 of Irving H. Picard, Trustee for the Liquidation of Bernie
18 L. Madoff Investment Securities LLC and Bernard L. Madoff

19
20 RE: Doc #156 Reply to Motion/Banque Syz SA's Reply to the
21 Trustee's Memorandum in Opposition to Banque Sys's Motion to
22 Dismiss the Complaint (related document(s) 149) filed by
23 Richard B. Levin on behalf of Banque SYZ & Co., SA.

24
25

1 Adversary proceeding: 12-01205-cgm; Irving H. Picard,
2 Trustee for the Liquidation of B v. Multi-Strategy Fund
3 Limited
4 RE: Doc #91 Motion to Dismiss Adversary Proceeding (related
5 document(s) 1) filed by Robert J. Lack on behalf of Multi-
6 Strategy Fund Limited with hearing to be held on 5/18/22 at
7 10 a.m. at Videoconference (ZoomGov) (CGM)
8
9 RE: Doc #99 Motion to Dismiss Adversary Proceeding Notice
10 of Motion to Dismiss the Amended Complaint (related
11 document(s) 97) filed by Robert J. Lack on behalf of Multi-
12 Strategy Fund Limited with hearing to be held on 5/18/22 at
13 10:00 a.m. at Videoconference (ZoomGov) (CGM)
14
15 RE: Doc #108 Opposition/Trustee's memorandum of Law in
16 Opposition to Defendant Multi-Strategy Fund Limited's Motion
17 to Dismiss (related document(s) 99) filed by David J. Sheehan
18 on behalf of Irving H. Picard, Trustee for the Liquidation
19 of Bernard L. Madoff Investment Securities LLC
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21 RE: Doc #110 Reply Memorandum of Law of Defendant Multi-
22 Strategy Fund Limited in Support of its Motion to Dismiss
23 the Amended Complaint (related document(s) 99) filed by
24 Robert J. Lack on behalf of Multi-Strategy Fund Limited.
25 Transcribed by: Sheila Orms

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1 P R O C E E D I N G S

2 THE COURT: Good morning, everyone.

3 MR. CREMONA: Good morning, Your Honor.

4 THE COURT: Just for the record, the first matter
5 that we have on is 10-04289, Picard versus John Fujiwara and
6 that one, there's been a certificate filed of no objection;
7 is that correct?

8 MR. CREMONA: Good morning, Your Honor, this is
9 Nicholas Cremona appearing on behalf of the Trustee. That's
10 correct, Your Honor. After the objection deadline on
11 Friday, we submitted a certificate of no objection and a
12 proposed order granting the motion to enforce the settlement
13 agreement which remains in default.

14 THE COURT: Very good. I will -- when it comes
15 through the system, I'll -- we'll sign off on it, thank you.

16 MR. CREMONA: Thank you, Your Honor.

17 THE COURT: 12-01205, Irving Picard, the Trustee
18 versus Multi-Strategy Funds Limited, 12-01205, state your
19 name and affiliation.

20 MR. LACK: Good morning, Your Honor, Robert Lack
21 of Friedman Kaplan Seiler and Adelman for defendant Multi-
22 Strategy Limited.

23 THE COURT: I need to have everybody put their
24 appearance on first.

25 MR. LACK: Oh, yes. And also with me today is my

1 partner Jeffrey Fourmaux, who will present part of the
2 argument for the defendant.

3 THE COURT: Okay. Very good.

4 MR. FEIL: Good morning, Your Honor, Matthew Feil
5 for -- from Baker Hostetler for the Trustee and my colleague
6 Matthew Friedman will also be appearing for the Trustee.

7 THE COURT: Very good. Mr. Lack, it's your
8 motion.

9 MR. LACK: Thank you, Your Honor. This is the
10 first motion to dismiss in a series of approximately 80
11 proceedings brought by the Trustee to recover transfers from
12 offshore Madoff feeder funds to foreign transferees.

13 The Trustee alleges that the transfers constituted
14 subsequent transfers of customer property, initially
15 transferred to those feeder funds by Bernard L. Madoff
16 Investment Securities LLC or BLMIS, which I'll refer to
17 sometimes as Madoff.

18 The legal issues we will argue today are common to
19 nearly all the cases. I will address two of them, the
20 applicability of the safe harbor in Section 546(e) in the
21 Bankruptcy Code and the Trustee's failure to plausibly
22 allege the transfer at issue constituted customer property.
23 My partner, Jeff Fourmaux will address the lack of personal
24 jurisdiction.

25 In the case of Multi-Strategy, the issues are

1 presented exceptionally clearly. Multi-Strategy is an
2 investment fund established in the Cayman Islands and
3 operated out of Canada.

4 In the Trustee's amended complaint filed in
5 February of this year, the Trustee seeks to recover a single
6 transfer of \$25.8 million made from Fairfield Sentry to
7 Multi-Strategy on March 15th, 2005.

8 The amended complaint was filed after Multi-
9 Strategy made its initial motion to dismiss. The Trustee
10 does not seek any discovery in connection with this motion
11 and does not seek leave to amend.

12 In this case, as in many others, the Trustee has
13 given the back of his hand to Multi-Strategy's motion.
14 Section 546(e) does not apply, he says, because the initial
15 transferee, Sentry, is alleged to have had actual knowledge
16 of Madoff's fraud.

17 The Trustee denies any obligation to link the
18 initial transfers from Madoff to Sentry to the subsequent
19 transfer from Sentry to Multi-Strategy. And he says that
20 Multi-Strategy's intent that its investment in Sentry would
21 ultimately be invested in the U.S. market is enough to
22 establish jurisdiction.

23 All of these Trustee assertions are wrong, and fly
24 in the face of Judge Rakoff's opinion in Cohmad, this
25 Court's decision in Fairfield Investment Fund, the Supreme

1 Court's decision in Iqbal, Twombly and Walden, and many
2 others.

3 Now, we start with Section 546(e). Section 546(e)
4 prevents the Trustee from avoiding certain initial
5 transfers. The Trustee does not dispute that it applies by
6 its terms to the initial transfer alleged to have occurred
7 from Madoff to Sentry in this case.

8 That is, he does not dispute that Madoff was a
9 stockbroker, that Sentry was a financial institution and
10 that the transfer was a settlement payment or in connection
11 with a securities contract. He does not dispute that that
12 transfer that Multi-Strategy was made more than two years
13 before the petition date.

14 The real issue on this motion is not whether the
15 safe harbor applies to the initial transfer. It clearly
16 does. But which transferees can invoke it, whether the
17 actual knowledge of the initial transferee can be used to
18 strip the safe harbor protection from a subsequent
19 transferee that does not have actual knowledge?

20 The Trustee's argument against the safe harbor has
21 two steps. First, he says that under Cohmad, Section 546(e)
22 cannot be invoked by the initial transferee, Sentry, because
23 of Sentry's alleged actual knowledge of Madoff's fraud.

24 And second, the Trustee goes on to argue because
25 the safe harbor cannot be invoked by the initial transferee,

1 it cannot be invoked by the subsequent transferee, Multi-
2 Strategy, either, even though Section 546(e) literally
3 applies and Multi-Strategy is not alleged to have had actual
4 knowledge of the fraud.

5 The Trustee's second step is not supported by
6 Cohmad. Quite the opposite. Cohmad stands for the
7 proposition that a transferee's ability to invoke the safe
8 harbor, depends on whether that transferee, that is the
9 defendant being sued had actual knowledge of the fraud.

10 At the start of his opinion, Judge Rakoff weighs
11 out his holding in two paragraphs. First, where exception
12 546(e) would otherwise apply, the initial transferee cannot
13 invoke it, if the initial transferee had actual knowledge of
14 the fraud.

15 And second, where 546(e) would otherwise apply,
16 the subsequent transferee cannot invoke it if the subsequent
17 transferee had actual knowledge of the fraud.

18 No where does Judge Rakoff say that where Section
19 546(e) would otherwise apply, the subsequent transferee
20 cannot invoke it if the initial transferee had actual
21 knowledge of the fraud. And there's no reason to believe
22 that Judge Rakoff would deny an otherwise applicable safe
23 harbor to an innocent subsequent transferee. His stated
24 reason for his holding in Cohmad was that Section 546(e) is
25 designed to protect the legitimate expectations of parties

1 to securities contracts. And that if a transferee actually
2 knew that there was no securities contract between --
3 because Madoff who is not trading securities, there's no
4 reason to give that transferee the benefit of the safe
5 harbor.

6 But there, there is no allegation that Multi-
7 Strategy knew Madoff was not trading securities. They had
8 every reason to believe that any transfer from Madoff to
9 Sentry was in connection with a securities contract, either
10 between Madoff and Sentry or between Sentry and Multi-
11 Strategy. Cohmad's rationale supports Multi-Strategy's
12 ability to invoke the safe harbor.

13 Now, this Court adopted this approach in Fairfield
14 Investment Fund when it focused on the actual knowledge of
15 the various subsequent transferees in deciding whether to
16 dismiss the subsequent transfer claims against it.

17 In the case of Corina Noel Piedrahita, the Court
18 found that there were no allegations that she had actual
19 knowledge of the fraud and dismissed the subsequent transfer
20 claim against her.

21 Had the Trustee's theory been correct and the
22 actual knowledge of Sentry had been sufficient to deny
23 subsequent transferees the ability to invoke the safe
24 harbor, this Court would have refused to dismiss the claim
25 against Ms. Piedrahita since it found that Sentry's actual

1 knowledge had been adequately alleged. But the Court
2 dismissed Ms. Piedrahita because she lacked actual
3 knowledge. A consistent approach requires dismissal of
4 Multi-Strategy here.

5 The Trustee argues that allowing the subsequent
6 transferee to invoke the safe harbor when the initial
7 transferee cannot, is somehow treating them unequally, not
8 so.

9 The same rule from Cohmad applies to both.
10 Transferees with actual knowledge cannot avail themselves
11 with the safe harbor. As Judge Rakoff put it in the passage
12 Your Honor quoted in Fairfield Investment Fund, quote, if
13 the Trustee sufficiently alleges that the transferee from
14 whom he seeks to recover a fraudulent transfer knew of
15 Madoff's securities fraud, that transferee cannot claim the
16 protections of Section 546(e), safe harbor, unquote.

17 Here, the Trustee does not allege that Multi-
18 Strategy knew of Madoff's fraud. Multi-Strategy thus can
19 invoke the safe harbor, even if Sentry cannot. Indeed,
20 allowing the Trustee's claim against Multi-Strategy would be
21 treating innocent transferees unequally.

22 All innocent initial transferees that received
23 transfers more than two years before the petition date, have
24 been dismissed based on the safe harbor as a result of
25 the Second Circuit's decision in Fishman.

1 It would be bizarre and unjust for innocent
2 subsequent transferees to be denied the use of the safe
3 harbor, where they had no direct dealings with Madoff and
4 thus were further removed from Madoff's wrongdoing than the
5 initial transferees.

6 If Your Honor has no questions on this, I'll
7 proceed to customer property.

8 THE COURT: Okay.

9 MR. LACK: Because --

10 THE COURT: One thing I did want to say is if you
11 emphasize what you've written and don't repeat yourself, it
12 helps me.

13 MR. LACK: Oh, yes, absolutely, Your Honor. And I
14 have --

15 THE COURT: (indiscernible), right?

16 MR. LACK: Yeah, absolutely.

17 THE COURT: Okay. Thank you.

18 MR. LACK: Okay. On the issue of customer
19 property, the Trustee claims that because Sentry invested
20 nearly all its money in BLMIS, all redemptions from Sentry
21 had to be Madoff customer property.

22 The problem is that the Trustee's own pleading
23 show that this is implausible and in the case of a single
24 transfer to Multi-Strategy impossible.

25 This is not a matter of expert opinion, but simple

1 arithmetic. The first transfers from Madoff to Sentry
2 within the six year period preceding the petition date began
3 on May 9th, 2003.

4 On May 9th, July 11th, and July 22nd, 2003 BLMIS
5 sent \$40 million, \$55 million and \$25 million respectively
6 to Sentry, for a total of \$120 million.

7 There were no further transfers from Madoff to
8 Sentry in the nearly two years from that time until Multi-
9 Strategy received its redemption on March 15th, 2005.

10 Now, how do we know this on this motion to
11 dismiss? It's in the tables attached as exhibits to the
12 amended complaint that the Trustee filed against Multi-
13 Strategy.

14 The Trustee has filed complaints alleging that
15 during May 2003 and the following months, Fairfield Sentry
16 transferred hundreds of millions of dollars of Madoff
17 customer property to Fairfield affiliated entities and
18 Fairfield investors.

19 Simply adding these up -- yes. And simply adding
20 these up, as I did in my declaration shows that all the
21 Madoff money was gone by the time Multi-Strategy received
22 its redemption in March 2005.

23 The money Multi-Strategy received could not have
24 come from Madoff. It had to have come from other Sentry
25 investors.

1 In Multi-Strategy's case, the Court doesn't need
2 to look beyond the Trustee's amended complaint against
3 Multi-Strategy and the documents it incorporates by
4 reference.

5 The Trustee's second amended complaint against
6 Fairfield Sentry which is incorporated by reference into the
7 Trustee's amended complaint against Multi-Strategy was more
8 than \$300 million of transfers from Sentry to a Fairfield
9 affiliated entities between May 9th, 2003 and March 14th,
10 2005. Far more than the \$120 million Madoff sent to Sentry.
11 It is simply not plausible on the face of the Trustee's
12 amended complaint against Multi-Strategy that Multi-Strategy
13 received any Madoff customer property in the single
14 redemption on March 15th, 2005.

15 Now, the Trustee says -- the Trustee says that our
16 exhaustion argument belies on the factual assumption that
17 every transfer from Sentry that preceded ours was sourced
18 solely by customer property. He says that on page 30 of his
19 opposing brief.

20 On this motion, we are entitled to this assumption
21 because the Trustee alleges precisely this in his
22 complaints. The Trustee alleges in his complaints that the
23 entire subsequent transfers to each defendant consisted of
24 customer property, not that only some of them did.

25 For example, the amended complaint against Multi-

1 Strategy alleges in paragraph 2 that quote, the Trustee
2 seeks to recover a single subsequent transfer of \$25,763,374
3 in BLMIS customer property.

4 In paragraph 331 of the Trustee's second amended
5 complaint against Fairfield Sentry, he alleges that all
6 subsequent transfers quote, were and remain customer
7 property. And indeed, in the amended complaint, the trustee
8 filed yesterday, against Standard Charter Financial Services
9 Luxembourg, he seeks to recover \$289 million in alleged
10 subsequent transfers. And alleges in paragraph one that all
11 \$289 million is quote, BLMIS customer property, unquote.

12 Thus, holding the Trustee to what he alleged in
13 his complaints, all of the Madoff money that was received
14 before March 15th, 2005, had to have been distributed by
15 Sentry to others before Multi-Strategy received its
16 redemption.

17 This is not a matter of tracing of commingled
18 property. At the time of Multi-Strategy's redemption, there
19 was no commingling with Madoff and non-Madoff money because
20 there was no Madoff money left in Sentry.

21 None of the cases cited by the Trustee involved a
22 situation in which customer property had been exhausted or
23 in which nearly two years had passed between the last
24 alleged initial transfer and the alleged subsequent
25 transfer.

1 As we noted in our reply brief, those cases
2 involve linkages between the initial and subsequent
3 transfers that were apparent on the face of the pleadings,
4 with corresponding amounts within short periods of time.
5 The Trustee made no attempt to show any such linkage here.

6 Indeed, the Trustee does not dispute that he has
7 sued for billions of dollars more in subsequent transfers
8 than Sentry ever received from Madoff.

9 His allegations that these subsequent transfers
10 all are customer property simply cannot be true. If
11 following Twombly required the Trustee to show how each
12 transfer could plausibly be customer property. He has not
13 done so even though he has had access to Sentry's books and
14 records for more than a decade.

15 In the case of a single transfer to Multi-Strategy
16 he failed to show any linkage to customer property in his
17 amended complaint even after his failure was highlighted in
18 our initial motion to dismiss. His claim should therefore
19 be dismissed without leave to amend.

20 At this point, Your Honor, unless you have some
21 questions about the customer property, I'll ask Mr. Fourmaux
22 to address personal jurisdiction.

23 THE COURT: Very good, Mr. Fourmaux.

24 MR. FOURMAUX: Good morning, Your Honor, Jeff
25 Fourmaux, Friedman Kaplan Seiler and Adelman for defendant

1 Multi-Strategy Fund. I'll be addressing why there's no
2 personal jurisdiction here.

3 The basic jurisdictional facts are undisputed.
4 I'll just mention the highlights. Multi-Strategy is an
5 investment fund organized in the Cayman Islands with its
6 principal place of business in Canada. Multi-Strategy did
7 not negotiate or execute its subscription agreements or its
8 redemption requests with Sentry in the United States. Those
9 documents were all signed in Canada and faxed to the
10 Netherlands.

11 The subscription and redemption payments went by
12 wire transfer from Multi-Strategy's bank account in Canada
13 to Sentry's bank account in Ireland and vice versa.

14 Now, the Trustee makes four arguments for specific
15 jurisdiction, but on the facts here, none of them
16 establishes a prima facie case, either alone or in
17 combination.

18 First, there's the Trustee's lead argument for
19 specific jurisdiction. That's the Trustee's knowledge and
20 intent theory and it's fundamentally contrary to controlling
21 appellate authority.

22 The Trustee alleges that Multi-Strategy bought
23 shares of Sentry knowing and intending that Sentry would
24 invest Multi-Strategy's money with Madoff in New York and
25 that Madoff purported to trade in U.S. securities.

1 The Trustee asserts that quote, by investing in
2 this way, defendant purposely undertook investment
3 activities in the United States, end quote. That's the
4 amended complaint, paragraph 100. That is a theory of
5 imputation, Your Honor.

6 The Trustee asks the Court to treat Sentry's act
7 of investing Multi-Strategy's money with Madoff in New York
8 as being Multi-Strategy's own action in New York. By doing
9 that, the Trustee seeks to impute Sentry's New York contact
10 to Multi-Strategy. But neither the Trustee nor the BLI
11 opinion he relies on, cites any precedent or authority for
12 his knowledge and intent theory of imputation.

13 Why not? Because the Trustee's theory is
14 contradicted by well established principles. First,
15 specific jurisdiction must be based on a defendant's own
16 contacts with the forum, not on the plaintiff's, or any
17 third party's contacts with the forum. That's the core
18 principle confirmed in the Supreme Court's 2014 decision in
19 Walden v Fiore.

20 Second, federal law and New York law both respect
21 the separate legal personalities of corporation and
22 shareholder when determining jurisdiction. And that's what
23 Sentry and Multi-Strategy are, corporation and shareholder.

24 The upshot of those two principles is that neither
25 federal law from the Second Circuit nor New York law will

1 impute a corporation's jurisdictional contacts to a
2 shareholder except in two narrow well defined circumstances.

3 The first exception is that the corporation is an
4 alter ego or a mirror department of the shareholder. But
5 the Trustee's claiming -- is not claiming there's any ground
6 for piercing the corporate veil between Multi-Strategy and
7 Sentry.

8 The second exception is agency. There's a very
9 well established test for that, which the Trustee
10 acknowledges his brief at page 17. It requires, among other
11 things, that the shareholder must have some control over the
12 corporation in its conduct of the transaction in New York.
13 But the Trustee concedes that Multi-Strategy did not have
14 control over Sentry's investments with BLMIS.

15 Instead, the Trustee alleges that quote, personnel
16 at FGG's New York headquarters maintained final control of
17 Fairfield Sentry's investments at BLMIS, end quote. That's
18 amended complaint, paragraph 62.

19 So because the Trustee does not allege all the
20 required elements of either alter ego or agency, Sentry's
21 contacts with New York cannot be imputed to Multi-Strategy.

22 Now, nonetheless, the Trustee urges the Court to
23 follow the result in Judge Lifland's decision in Picard v
24 Bureau of Labor Insurance from 2012. That's -- we'll call
25 that BLI for short. And he asked on that basis to impute

1 Sentry's New York contacts to Multi-Strategy just based on
2 insufficient elements of knowledge and intent.

3 The controlling Second Circuit and New York Court
4 of Appeals law on imputation was never briefed by either
5 party in BLI. There were only two pages briefing on
6 specific jurisdiction by the defendant in that case. And
7 that briefing made it appear as if the dispositive issue was
8 just a factual question on whether the defendant's funds
9 ended up in the Madoff accounts, merely as a result of
10 happenstance or coincidence, or whether the Trustee
11 adequately alleged the defendant knew and intended all along
12 that Sentry would place its money with Madoff in New York.

13 It was in that context, Your Honor, that the BLI
14 court only responding to the arguments actually made to it
15 held that personal jurisdiction would be found because the
16 defendant knew and intended that Sentry would invest its
17 money with Madoff in New York.

18 But long established controlling case law that was
19 never briefed to or addressed by BLI shows why knowledge and
20 intent are not enough. We discuss it in our moving brief.

21 In opposition, the Trustee does not dispute that
22 Multi-Strategy identified the controlling appellate court
23 authority. The Trustee does not dispute that imputation
24 requires alter ego or agency and the Trustee did not dispute
25 that he has not alleged facts showing either. He does not

1 cite any appellate case law permitting imputation based on
2 knowledge and intent alone. Those concessions are
3 dispositive, Your Honor.

4 Because BLI assumed, without addressing, that the
5 Trustee's theory of knowledge and intent was legally
6 sufficient and because that theory is, in fact, contrary to
7 controlling legal framework, this Court respectfully repeat
8 BLI's result here.

9 Unless Your Honor has any questions, I'll move to
10 the second. So the second argument is -- relates to
11 communications from Canada to New York.

12 The Trustee alleges that Multi-Strategy
13 representatives in Canada sent e-mails and made phone calls
14 to Fairfield Greenwich employees in New York. The Trustee
15 does not allege that any transaction was conducted or
16 negotiated through those communications. Without that, such
17 communications do not constitute transacting business in New
18 York under well established authority that we cited in our
19 briefs.

20 The Trustee also points to the fact that shortly
21 after Multi-Strategy first purchased shares in Sentry in
22 July 2004, Multi-Strategy representatives visited New York
23 and while here, having an introductory meeting with some
24 Fairfield Greenwich employees. Again, there's no
25 allegations that any transaction was conducted or negotiated

1 at that meeting. And without any transaction that one
2 meeting does not constitute purposeful availment of the
3 privilege of doing business in New York.

4 In addition to that, the Trustee's claim does not
5 arise out of or relate in any way to any of the alleged
6 telecommunications or the single meeting.

7 Third, the Trustee has an argument based on the
8 subscription fees. The Trustee contends that Multi-
9 Strategy's subscription agreements with Sentry. In them,
10 Multi-Strategy agreed to a choice of New York law and
11 consented to personal jurisdiction of New York courts with
12 respect to certain matters.

13 But as noted in our briefs, there's controlling
14 precedence from UK Privy Council in Migani and from this
15 Court in Fairfield I, that foreclosed that argument.

16 And then last, Your Honor, the Trustee's last
17 argument of personal jurisdiction relates to correspondent
18 bank accounts. There's a few essential facts that are
19 needed to put that argument in context.

20 Sentry had a bank account at the Dublin, Ireland
21 branch of Citco Bank, which is a Dutch bank. Multi-Strategy
22 had a bank account at a Montreal, Canada branch of
23 Desjardin, which is a Canadian Bank. Like most non-U.S.
24 banks, Citco Bank and Desjardin hold and use correspondent
25 accounts at U.S. banks to facilitate U.S. dollar wire

1 transfers.

2 The Trustee contends that Multi-Strategy
3 purposefully availed itself of the privilege of doing
4 business in New York because Sentry and Multi-Strategy were
5 customers of banks, that in turn, used correspondent
6 accounts in New York to facilitate U.S. dollar wire
7 transfers between their accounts in Ireland and Canada.
8 There is no case law support for the Trustee's assertion,
9 Your Honor.

10 The Trustee cites cases on New York bank accounts.
11 But in all of them, it's the defendant that selects, holds,
12 controls and uses the New York bank account and that's a
13 basis for finding that the defendant was transacting
14 business in New York in those cases.

15 In situations like we have here, where the
16 defendant is just a customer of a non-party foreign bank
17 that has and uses a correspondent account in New York, that
18 does not count as bank customer itself doing business in New
19 York.

20 Judge Valerie Caproni, at the district court in
21 the 2021 Berdeaux OneCoin case that we cited in our reply
22 brief surveyed the law in this area just last fall and
23 concluded that there is no authority, quote, standing for
24 the principal that a non-domiciliary individual defendant
25 may be subject to specific jurisdiction in New York under

1 Section 302(a)(1) because the non-domiciliary moved money
2 between foreign bank accounts, that the transfer passing
3 through New York via a correspondent account, end quote.

4 I'd say, moreover, the Trustee's claims do not
5 arise out of or relate in any way to the fact that wire
6 transfers between Ireland and Canada were routed through New
7 York midway.

8 In closing, Your Honor, I note that Multi-Strategy
9 moved to dismiss the Trustee's original complaint for lack
10 of personal jurisdiction on the same grounds in January of
11 this year, 2022. The Trustee responded to Multi-Strategy's
12 original complaint by filing the amended complaint in
13 February. But the amended pleading doesn't cure any of the
14 jurisdictional facts that we showed in January.

15 So I would submit, respectfully, Your Honor, that
16 the Court should dismiss for lack of personal jurisdiction
17 without leave to amend.

18 If Your Honor has questions, I'd be happy --

19 THE COURT: No.

20 MR. FOURMAUX: -- to address them, otherwise, I
21 would ask that I be permitted some time in rebuttal after
22 the Trustee's counsel speaks.

23 THE COURT: Very good.

24 MR. FOURMAUX: Thank you.

25 THE COURT: Mr. Feil, before you begin, I have one

1 question for you. The -- Kingate is mentioned and I'm --
2 since I'm new to this case, what happened with Kingate?

3 MR. FEIL: I'm sorry, Kingate is mentioned in what
4 capacity, Your Honor?

5 THE COURT: Well, you had it in some of the things
6 -- maybe it wasn't -- maybe it's in the other case, not this
7 one. Maybe it's in the other case.

8 MR. FEIL: I think it's in the other case, Your
9 Honor.

10 THE COURT: Okay. Very good, we'll talk about it
11 then. Thank you.

12 MR. FEIL: Okay. I will be responding to Mr.
13 Lack's arguments concerning Section 546(e) and the
14 plausibility of the Trustee's transfer claim. And then my
15 colleague, Mr. Friedman will address why this Court has
16 jurisdiction over the defendant.

17 Your Honor, I'd like to begin by discussing the
18 defendant's right to assert the Section 546(e) defense in
19 this action to recover a subsequent transfer and how prior
20 decisions of the district court and the Bankruptcy Court in
21 this liquidation made clear that the Trustee is not required
22 to allege that the subsequent transferees had actual
23 knowledge. Well, Your Honor has already ruled that the
24 Trustee has sufficiently pled that the initial transferee
25 has actual knowledge.

1 Defendant is effectively arguing that it has an
2 independent right to assert the 546(e) defense, even whereas
3 here, the initial transferee is barred from asserting the
4 defense. That is wrong.

5 Defendant has a right to raise an indirect defense
6 to avoidance by stepping into the shoes of the initial
7 transferee and asserting the defenses available to the
8 initial transferee. That right, however, extends only so
9 far as the initial transferee could itself raise the defense
10 here.

11 Where the initial transferee is itself barred from
12 raising 546(e) as a defense, then too -- so too as the
13 subsequent transferee by stepping into its shoes. Thus Your
14 Honor's finding that the Trustee has pled Sentry's actual
15 knowledge forecloses the application of 546(e) at the
16 pleading stage in this action.

17 And there's no reason to consider whether the
18 defendant has actual knowledge for purposes of 546(e) to
19 decide the motion. This is evident from the consolidated
20 decisions of the district court in this liquidation.

21 Your Honor, the defendant talked about the Cohmad
22 decision and I'd like to just discuss that a little bit. In
23 April 2013, the district court issued that decision
24 explaining how Section 546(e) should be applied as to the
25 Trustee's claims against initials and subsequent

1 transferees.

2 The decision followed a bottom line order from the
3 district court which Multi-Strategy has block quoted in its
4 reply. It argues that the bottom line order requires the
5 Trustee to plead subsequent transferee's actual knowledge in
6 this 550 recovery action, despite the avoidability of the
7 initial transfers.

8 I'd like to walk the Court through the Cohmad
9 decision in the bottom line order and certain related case
10 law to show that there's only one part of the Cohmad
11 decision where the district court addresses how and when a
12 subsequent transferee's actual knowledge is relevant. And
13 to show how the defendant is misinterpreting that part of
14 the decision.

15 Both the decision and the bottom line order
16 establishes a subsequent transferees' actual knowledge is
17 only relevant when the initial transferee is innocent, and
18 can itself assert a 546(e) defense to avoidability.

19 Before we examine the bottom line order, I'd like
20 to turn the Court's attention to the part of the Cohmad
21 decision where the district court specifically addresses the
22 subsequent transferee's limited right to assert the defense.
23 And that's on page 7, Your Honor, of that opinion.

24 The district court addresses the question before
25 Your Honor, a subsequent transferee's right to raise the

1 546(e) defense in the context of a 550 recovery action.
2 That section of the decision begins by noting that to
3 recover from a subsequent transferee, the Trustee must first
4 show that the initial transfers, in our case, the transfers
5 from BLMIS to Sentry are avoidable.

6 The district court then explained that a
7 subsequent transferee has a right to raise the initial
8 transferee's defenses to avoidance, explaining and I quote
9 from that page 7, even if the initial or immediate
10 transferee fails to raise a Section 546(e) defense against
11 the Trustee's avoidance of certain transfers, either because
12 the Trustee did not bring an adversary proceeding against
13 that transferee or because the transferee settled with the
14 Trustee or simply because the transferee failed to raise the
15 defense, the subsequent transferee is nonetheless entitled
16 to raise a Section 546(e) defense against recovery of those
17 funds.

18 In support, the district court cites to and quotes
19 from the bankruptcy court's decision in In Re Fabrikanc.
20 And that establishes that a Trustee need not obtain a fully
21 litigated avoidance order against an initial transferee
22 before bringing a recovery action, but the defendant
23 subsequent transferees can raise that in that recovery
24 action and can defend it on the basis that the initial
25 transfers were not fraudulent.

1 In other words, in a recovery action against the
2 subsequent transferee, the defendant may challenge the
3 avoidance of the initial transfer by asserting the initial
4 transferee's defenses to avoidance. But then the district
5 court announces that there's one caveat to this rule. And
6 it is this one caveat that demonstrates that part 2 of the
7 district court's bottom line order does not require the
8 Trustee to allege a subsequent transferee's actual
9 knowledge, where the initial transferee itself has actual
10 knowledge.

11 Quoting now from page 7 of the district court's
12 Cohmad decision, the district court said, there's one caveat
13 to this rule, to the extent an innocent customer transferred
14 funds to a subsequent transferee who had actual knowledge of
15 Madoff's securities fraud, that subsequent transferee cannot
16 prevail on a motion to dismiss on the basis of Section
17 546(e) safe harbor.

18 The one caveat applies where an innocent customer
19 transferred funds to a subsequent transferee who had actual
20 knowledge. In other words, the one caveat applies only
21 where an innocent, initial transferee, one without actual
22 knowledge, could have asserted a successful 546(e) defense
23 to avoidance. That's the only scenario where the Trustee
24 must plead the subsequent transferee's actual knowledge,
25 where there is an innocent initial transferee.

1 Thus it's clear that the caveat does not require
2 the Trustee to independently plead the actual knowledge of
3 the subsequent transferee where the initial transferee could
4 itself not assert a valid 546(e) defense.

5 Returning now to the bottom line holding, which
6 appears on page 1 of the district court's decision. Part
7 one of Cohmad as Mr. Lack explained, stands for the
8 proposition that 546(e) will not bar avoidance where the
9 initial transferee has actual knowledge.

10 Part 2 of Cohmad reflects the one caveat that we
11 just discussed and that's clear because it applies only
12 where there is an innocent initial transferee, one with
13 actual knowledge -- without actual -- one without actual
14 knowledge, I'm sorry, Your Honor. And 546(e) otherwise
15 applies to bar avoidance of the initial transfer.

16 Part 2 begins quote, where the Trustee has sought
17 to recover transfers to a subsequent transferee, the
18 avoidance of which would otherwise be barred by Section
19 546(e) as to the initial transferee.

20 That makes clear that part 2 only applies where
21 the initial transferee has a valid 546(e) defense to
22 avoidance. And we can stop there, because that isn't the
23 case here, where avoidance of the initial transfer is not
24 barred by 546(e) at the pleading stage, as a result of Your
25 Honor's finding that the Trustee has adequately pled

1 Sentry's actual knowledge.

2 If the defendant's theory were correct, and the
3 Trustee is required to plead the actual knowledge of both
4 the initial and subsequent transferees, then there would be
5 no need for the district court's one caveat. Instead, one
6 caveat makes clear that the only situation where a Trustee
7 must plead the subsequent transferee's actual knowledge is
8 when there's an innocent initial transferee.

9 Part two, the one caveat is intended to prevent a
10 subsequent transferee with actual knowledge from being able
11 to step into the shoes of an innocent initial transferee and
12 assert the initial transferee's 546(e) defense.

13 And, Your Honor, this interpretation is confirmed
14 by later decisions from the district court and the
15 bankruptcy court applying Cohmad.

16 Turning first to the district court's consolidated
17 decision regarding the Trustee's right to bring a 550
18 recovery action without first obtaining an order of
19 avoidance. That decision is reported at 501 B.R. 26 and
20 cited on page 36 of the Trustee's opposition brief.

21 Multi-Strategy is bound by that decision as it was
22 among the parties who withdrew the reference on that issue.
23 The district court issued the decision several months after
24 its Cohmad decision and held, the Trustee did not have to
25 obtain a fully litigated final judgment of avoidance against

1 the relevant initial transferee as a precondition to
2 bringing the recovery action against the subsequent
3 transferee.

4 But and I quote from that decision at 501 B.R. 29,
5 Section 550(a) requires that the Trustee show that the
6 initial transferee he seeks to recover is avoidable in each
7 recovery action. And the subsequent transferee in
8 possession of that transfer may raise any defense to
9 avoidance available to the initial transferee, as well as
10 any defenses to recovery it may have.

11 The district court set out a few general
12 principles guiding its decision and these two quotes that
13 I'm about to read appear at the bottom of 29 and the top of
14 30 in that decision.

15 First, the transfer that the Trustee must prove is
16 avoidable is the initial transfer of property by the debtor,
17 not any subsequent transfers of that property to the
18 defendants from whom the Trustee seeks to recover here.

19 Second, and relatedly, it is well established the
20 concepts of avoidance and recovery are separate and
21 distinct. As set forth in the Bankruptcy Code, each type of
22 action is subject to different defenses, including separate
23 statutes of limitations.

24 Applying those principles, Your Honor, to the
25 question of whether a subsequent transferee may raise the

1 initial transferee statute of limitations' defense that this
2 court held, a subsequent transferee from whom the Trustee
3 seeks to recover, may assert any defense to avoidance
4 available to the initial transferee unless collateral
5 estoppel or res judicata applies. That's at page 35 of that
6 decision.

7 And a little bit further down on 35 and 36, the
8 district court made clear that the subsequent transferee
9 could raise that defense, but only to the extent that the
10 initial transferee could itself raise the defense.

11 In other words, the subsequent transferee can step
12 into the initial transferee's shoes to challenge avoidance,
13 but it does so only to the extent that the initial
14 transferee could itself raise the defense. To hold
15 otherwise, the district court instructed, would quote,
16 conflate the separate concepts of avoidance and recovery.
17 Thus, when the initial transferee's barred from asserting
18 the Section 546(e) defense to avoidance, so too is the
19 subsequent transferee stepping into its shoes.

20 Now, the Bankruptcy Court applied this Cohmad
21 decision in a situation that's analogous to the case before
22 you today and that was in Picard v BNP, 549 B.R. 167. And
23 there, the Bankruptcy Court held, quote, by its terms, the
24 safe harbor is a defense to avoidance of the initial
25 transfer.

1 And citing to page 7 of the Cohmad decision where
2 the district court discussed how to apply this defense in a
3 recovery action against the subsequent, the BNP court said a
4 subsequent transferee is protected indirectly, to the extent
5 that the initial transfer is not avoidable because of the
6 safe harbor.

7 The Bankruptcy Court continued, the Trustee does
8 not, however, avoid the subsequent transfer. He recovers
9 the value of the avoided initial transfer from the
10 subsequent transferee under 11 U.S.C. Section 550(a) and the
11 safe harbor does not refer to recovery claims under Section
12 550.

13 Now, Multi-Strategy argues in its reply that the
14 BNP decision doesn't apply or is inconsistent with the
15 district court's Cohmad decision. Specifically they argue
16 that the Bankruptcy Court focused on a strawman argument by
17 not considering quote, whether a subsequent transferee's
18 invocation of Section 546(e) is barred by the initial
19 transferee's actual knowledge. That's at page 5 of their
20 reply.

21 But that's simply wrong. In BNP the subsequent
22 transferee defendants made the same argument the defendant
23 does here. And Your Honor can see that by looking at the
24 reply brief in that action, which is available on the
25 Court's docket at 12 -- Adversary Proceeding No. 12-01576

1 and it's ECF No. 116 and the quotes that I'm about to read
2 appear on pages 9 and 10.

3 There, the defendant argued, quote, the trustee
4 can escape application of the Section 546(e) to his recovery
5 claims here only by sufficiently pleading that both the
6 initial and -- and the initial transferees and the BNP
7 defendant who is the subsequent transferee there had actual
8 knowledge of the Madoff fraud.

9 THE COURT: Mr. Feil just froze.

10 MR. FEIL: I'm sorry, can you see me?

11 THE COURT: Did everybody else freeze or is it
12 just Mr. Feil?

13 MR. FEIL: I --

14 THE COURT: Mr. Cremona?

15 MR. CREMONA: Seems fine to me, Your Honor.

16 MR. FEIL: I can hear you, Your Honor.

17 THE COURT: Are you frozen.

18 MR. CREMONA: I am not.

19 THE COURT: Yes.

20 MR. FEIL: Can you not hear any of us? Your
21 Honor, I can hear you.

22 THE COURT: Why -- Mr. Fourmaux, you're not
23 frozen, are you?

24 MR. FEIL: Your Honor, are you able to hear me?

25 THE COURT: Are you frozen? I'm frozen.

1 MR. FEIL: I can, I can hear you, Your Honor.

2 THE COURT: I'm the one. I'm the one that froze.

3 MR. FEIL: Okay. Are you able to hear me now?

4 THE COURT: I am.

5 MR. FEIL: Okay.

6 THE COURT: You were at Docket No. on our -- you
7 were talking about Docket No.

8 MR. FEIL: Yes, that's right.

9 THE COURT: And that was when you froze.

10 MR. FEIL: Okay. I'll pick up there, Your Honor.

11 THE COURT: Okay. Thank you.

12 MR. FEIL: You're welcome, thank you.

13 So what I was mentioning was the reply brief, the
14 defendant's reply brief in the BNP action. I'm about to
15 read two quotes from that, that demonstrate that they made
16 the same argument that the defendant here is making now.
17 And their reply brief is available on the docket for
18 Adversary Proceeding No. 12-01576, and that's at ECF No. 116
19 and it's two quotes that appear on pages 9 and 10.

20 And they say that the trustee can escape the
21 application of Section 546(e) to his recovery claims here
22 only by sufficiently pleading both that the initial
23 transferees and the BNPP defendant who is the subsequent
24 transferee there, had actual knowledge of the Madoff fraud.

25 That's precisely what they're arguing here, Your

1 Honor, is that even though we've alleged that the actual
2 knowledge of the initial transferee, we also have to allege
3 the actual knowledge of the subsequent transferee and it
4 continued in the BNP brief to say, Section 546(e) is
5 intended to provide an objective safe harbor to the entire
6 chain of securities customers. And that's exactly what Mr.
7 Lack just argued.

8 Those are the same arguments that they made in
9 their brief as well. Even where this Court has determined
10 that the Trustee would have to allege the subsequent
11 transferee's actual knowledge, even where this Court has
12 determined that the initial transferee has already been
13 alleged to have actual knowledge.

14 In other words, Your Honor, like the defendant in
15 BNP, Multi-Strategy is arguing the Trustee must sufficiently
16 plead both of their actual knowledge.

17 Near the end of the Cohmad decision there's a
18 section where Judge -- the district court considers a
19 hypothetically whether a securities agreement between an
20 initial and subsequent transferee could satisfy the
21 securities contract element of 546(e).

22 The defendant suggests that this hypothetical
23 gives it an independent right to assert 546(e) in this
24 recovery action. But that's not what Cohmad held. As
25 previously discussed, Cohmad sets forth a single situation

1 where the subsequent transferee's actual knowledge is
2 relevant and that's where the initial transferee does not
3 have actual knowledge.

4 This was an issue at the time, the question of
5 whether another agreement could satisfy the securities
6 contract element because the district court's holdings in
7 In Katz and Gripe were on appeal before the Second Circuit.

8 And the Second Circuit has not yet issued its
9 decision in Ida Fishman confirming that the BLMIS account
10 opening agreement satisfied the securities contract element.

11 A group of financial institution defendants there
12 argued that even if Madoff's account documents were not
13 securities contracts, various other types of contracts could
14 satisfy that element of 546(e).

15 The district court's hypothetical was addressing
16 this argument, and while it agreed to other -- that other
17 contracts could satisfy that element, it did not suggest in
18 its hypothetical that the existence of such a contract would
19 shift the actual knowledge analysis to the subsequent
20 transferee.

21 To the contrary, Your Honor, that decision
22 reiterated that the focus of 546(e) remained on the
23 avoidance of the initial transfer from the debtor to the
24 initial transferee. And in BNP, the bankruptcy court did
25 not even feel the need to address this hypothetical, even

1 though the subsequent transferee defendants there argued
2 again Section 546(e) is intended to provide an objective
3 safe harbor to the entire chain of securities customers.
4 The bankruptcy court's decision in BNP is law of the case
5 and it is binding on Multi-Strategy.

6 Accepting defendant's position, Your Honor, would
7 conflate the Code separation between avoidance and recovery.
8 Accepting Multi-Strategy's position would mean that the safe
9 harbor would apply even where the initial transferee knew
10 there were no securities transactions in need need of
11 protection. It would also result in a situation where the
12 avoidability of the initial transfer turned on what the
13 initial transferee subsequently did with the transfer after
14 receiving it.

15 Take for example a situation where a Trustee
16 prevails in an avoidance action against the initial
17 transferee who had actual knowledge. Having obtained that
18 avoidance judgment, the Trustee then seeks to recover
19 portions of the initial transfer from two different
20 subsequent transferees, one with actual knowledge and one
21 without.

22 Can the transferee without actual knowledge argue
23 that the avoidance was wrongly decided? And if so, could
24 the Trustee still recover from the other subsequent
25 transferee who had actual knowledge, even though the

1 transfer is now not avoidable? That doesn't make sense,
2 Your Honor. You can't have the same transfer avoidable in
3 one action and not avoidable in another. As the district
4 court held in 550 -- in its 550 decision, this would
5 conflate the separate concepts of avoidance and recovery.

6 And just one last note about the defendant's
7 contention that Your Honor's holding in Fairfield Investment
8 Fund shows that you can apply 546(e) to a subsequent
9 transferee, even where the initial has actual knowledge.

10 That wouldn't explain why Your Honor dismissed the
11 two year claims against Ms. Piedrahita. And there are two
12 other reasons why the Court would have considered Ms.
13 Piedrahita's actual knowledge and that's because as an agent
14 of Fairfield, her actual knowledge would be imputable to the
15 initial transferee.

16 And then second, when the Court decided that case,
17 the Citibank -- the Second Circuit has not issued its
18 decision in Citibank yet. Thus, the Trustee was required to
19 plead the subsequent transferee's lack of good faith which
20 required a showing of willful blindness or actual knowledge.

21 Just one last note on 546(e) and then I'll move on
22 to customer property. And that's that the defendant says
23 that we conceded that their transfer was in connection with
24 -- well, the initial transfer from BLMIS to Sentry was in
25 connection with an agreement between them. As I just

1 explained, I don't think that that's relevant, but we did
2 not concede that point and we specifically refuted it at
3 footnote 14 on page 36 of our brief.

4 So with that, I'll move -- unless Your Honor has
5 any questions about 546(e), I'll move on to the customer
6 property issue.

7 THE COURT: No, I don't believe so. I think
8 you've explained 546(e) very clearly.

9 MR. FEIL: Thank you.

10 So I'd like to begin by just explaining why the
11 Trustee satisfied its pleading burden under Rule 8 with
12 respect to the subsequent transfer claim and then I'll
13 address the defendant's arguments briefly.

14 First, Sentry -- the alleged -- the Trustee
15 alleges the following. First, Sentry sent substantially all
16 of its assets to BLMIS to be custodied and invested.

17 Second, Multi-Strategy delivered funds to Sentry
18 for the purpose of having them custodied and invested with
19 BLMIS.

20 Third, in February of 2005, Multi-Strategy got so
21 scared about Madoff and the potential Ponzi scheme, that it
22 redeemed all of its Madoff investments, including those made
23 through Sentry.

24 Fourth, Sentry responded to the defendant's
25 redemption request by transferring \$25,763,374 to

1 defendant's designated New York bank account on March 15th,
2 2005.

3 Fifth, when Madoff's fraud was revealed publicly
4 defendant expressed satisfaction and good fortune that it
5 had obtained this transfer while it could before Madoff's
6 Ponzi scheme collapsed.

7 This record satisfies the Trustee's pleading
8 burden under Rule 8(a) because it gives the defendant notice
9 of the claims against it and plausibly alleges that the
10 defendant received a subsequent transfer that contained
11 stolen customer property.

12 Defendant advances two arguments as to why the
13 Trustee has fallen short here, and before I address the
14 substance of their arguments, it's worth noting that the
15 overwhelming weight of authority favors allowing the Trustee
16 to proceed to discovery on this point.

17 The case law establishes that there's an equitable
18 element to tracing, and that the Court should look to all of
19 the circumstances surrounding the transfers, including the
20 purposes of the transfers and the parties' intent.

21 Despite dedicating a third of both of their briefs
22 to this argument, the defendant identifies only two cases
23 that even dismissed claims at the pleading stage, both of
24 which allowed the plaintiff to replead.

25 So then I'll move on to their arguments. The

1 first argument that Mr. Lack discussed today was that the
2 Trustee has not linked the subsequent transfer to any
3 specific initial transfers. And this argument relies almost
4 entirely on the Picard v Shapiro. But that case is easily
5 distinguishable from the incident case.

6 The Court there found that the complaint lacked
7 the vital statistics necessary to support the subsequent
8 transfer claim, because it alleged the subsequent transfers
9 upon information and belief and without any detail.

10 Because the complaint lacked these vital
11 statistics, the Court found, and I quote, this is on page
12 119, 542 B.R. at 119, because the complaint lacked these
13 vital statistics, the Court found he did not plausibly imply
14 that the initial transferees even made subsequent transfers
15 to the subsequent transferees.

16 As discussed here, the vital statistics are set
17 forth in the amended complaint. Moreover, defendant has
18 stipulated to the fact that it received the subsequent
19 transfer from Sentry. It has also submitted documents with
20 its motion evidencing that it received the subsequent
21 transfer from Sentry.

22 Thus, there's no question that Sentry made the
23 subsequent transfer to Multi-Strategy. And the bankruptcy
24 court's statement in the complaint in Shapiro did not tie
25 any initial transfer to a subsequent transfer or subsequent

1 transferee, was made in the context of allegations lacking
2 these basic vital statistics, and it should not require such
3 linkage here.

4 That's especially true where the Trustee plausibly
5 alleges that pursuant to Sentry's own governing documents,
6 BLMIS was the custodian of substantially all of Sentry's
7 assets.

8 At a loss for supporting authority, Your Honor,
9 defendant cites in its reply to cases that denied motions to
10 dismiss, nevertheless claiming that they support dismissal
11 here. And I'll just talk about one briefly and that Judge's
12 Lifland's decision in Cohmad, the original decision which is
13 454 B.R. 317. The relevant portion is at page 340 and
14 there, Judge Lifland set forth the same Rule 8(a) notice
15 pleading that the Trustee asserts here.

16 Quote, set forth the necessary vital statistics
17 the who, when, and how much of the purported transfers. And
18 Judge Lifland set the baseline for pleading a subsequent
19 transfer, as quote, at the very least, the Trustee must
20 plead a statement of facts that adequately appraises the
21 subsequent transferees of the transfers he seeks to recover.

22 And although Judge Lifland discussed connections
23 between the initial and subsequent transfers there, he
24 concluded, quote, if the information contained in the
25 complaint and the exhibits attached thereto provide more

1 than enough detail to provide the defendants with notice of
2 when and what amount, with what frequency and from whom they
3 received subsequent transfers, as well as why. And again,
4 here, as I mentioned, there's no doubt that the amended
5 complaint alleges all those same things.

6 Defendant next argues that the Trustee -- the
7 Trustee's allegations in this and other actions render it
8 impossible that the Trustee -- that the subsequent transfer
9 received from Sentry contained any stolen customer property.

10 To support this theory, the defendant adopts an
11 allegation made by the Fairfield liquidators, that says,
12 from time to time to make redemption payments, Sentry made
13 withdrawals from Sentry's BLMIS accounts or utilized
14 subscription monies of other investors on hand that were
15 directed from investment in BLMIS.

16 In other words, defendant is suggesting that the
17 subsequent transfer it received could not have contained any
18 stolen customer property but was instead, comprised solely
19 of funds from Sentry's other investors directed from
20 investment with BLMIS.

21 It's essentially asking this Court to discredit
22 the Trustee's well pled allegation that Sentry's governing
23 documents provided that it sent substantially all of its
24 assets to BLMIS, based on this allegation of the Fairfield
25 liquidators.

1 Defendant's argument fails at the pleading stage
2 for four reasons. First, even if the liquidator's
3 allegation is true, it doesn't establish how Sentry
4 accomplished this. Was it from a commingled account, were
5 certain redemptions paid entirely from one source or
6 another, or were they all paid from a combination of funds?

7 This all underscores that the key category of data
8 is missing from the analysis, and that's the dates and
9 amounts of influence of funds to Sentry and what Sentry did
10 with those funds.

11 Without that part of the picture, it's impossible
12 to accurately assess to what extent each subsequent transfer
13 contained customer property. And in this situation, the
14 case law is clear, that the Trustee is not required to trace
15 customer property at the pleading stage or even at summary
16 judgment.

17 This is why the defendant is unable to point the
18 Court to a single case, dismissing subsequent transfer
19 claims at the pleading stage under a similar theory.
20 Defendant nevertheless is asking this Court to reach a
21 finding of fact at the pleading stage that the transfer it
22 received contained no stolen customer property.

23 It does not disclose what tracing methodology it
24 purports to use to reach this conclusion. In its reply,
25 defendant asserts that no tracing is required, only simple

1 arithmetic. But defendant's simple arithmetic appears to be
2 premised on a first in first out tracing methodology, which
3 again is not appropriate at the pleading stage. This is a
4 question for this Court to decide upon a full record,
5 including fact and expert discovery.

6 Second, the liquidator's allegation suggests that
7 Sentry treated redemption and subscription funds as fungible
8 and commingled those funds. But this type of commingling
9 does not defeat the Trustee's ability to trace customer
10 property, nor does it require the Trustee to do so at the
11 pleading stage.

12 Third, defendant's argument is premised entirely
13 on the assumption that the Trustee's subsequent transfer
14 exhibits can be read to establish that every subsequent
15 transfer was comprised solely of stolen BLMIS customer
16 property. But those exhibits do not establish that fact.

17 At the pleading stage, the Trustee is not required
18 to plead, much less establish that an alleged subsequent
19 transfer is comprised solely of customer property. As Judge
20 Lifland explained in Charles Ellerin Trust, even at summary
21 judgment, it's not necessary for the Trustee to specify what
22 portion of the subsequent transfer was derived from BLMIS.

23 Because the Trustee's transfer exhibits do not
24 establish that each transfer was comprised solely of BLMIS
25 customer property, defendant's arithmetic tracing method

1 breaks down and there's nothing to support their contention
2 that Sentry had exhausted the customer property on hand.
3 And defendant makes no attempt in its reply brief to address
4 this fatal flaw in its argument.

5 Moreover, for this Court to discredit defendant's
6 or credit defendant's argument and find that at the pleading
7 stage that the Trustee's transfer exhibits establish that
8 each transfer was comprised entirely of stolen customer
9 property it would have implications for other defendants,
10 who are also claiming that the transfers they received
11 contained no customer property.

12 Your Honor may have noticed from the motions that
13 have been coming in, that this is a theme. Every party is
14 arguing that somebody else got the customer property, which
15 just underscores why this issue is not appropriate on a
16 motion to dismiss.

17 Which brings me to the fourth reason. It's simply
18 premature to make these determinations at the pleading
19 stage. Courts in this district and even in this liquidation
20 have denied summary judgment where even a small or
21 undetermined portion of customer property was conceivably
22 traceable to the debtor.

23 The decision -- the bankruptcy court's decision in
24 In Re Dreier is instructive and there, the bankruptcy court
25 allowed the Trustee to proceed to trial where at most, 3 and

1 a half percent of the transfers at issue could be traced to
2 the debtor's Ponzi scheme.

3 And I'll just quote really quickly from that case
4 on page 15, it's 2014 Westlaw 47774 at 15. The subsequent
5 transferees argue that the Trustee failed to show that the
6 funds actually paid them any fees. However, it's reasonable
7 to assume that the funds satisfied their obligation to pay
8 fees under the solo note investments. And the Trustee is
9 not required to perform dollar-for-dollar tracing at the
10 summary judgment stage.

11 Finally, the manager's speculation that tracing is
12 not likely to reveal a subsequent transfer of stolen note
13 proceeds hardly justifies granting the cross motion for
14 summary judgment.

15 Similarly here, Your Honor, it's reasonable to
16 assume that Sentry satisfied its obligations under its own
17 private placement memoranda to custody substantially all of
18 its assets with BLMIS especially at the pleading stage.

19 Moreover, like the defendant in Charles Ellerin
20 Trust, defendant here quote, mistakenly argues that the
21 trustee must include evidence proving that the only funding
22 source for the initial transferee was from a Madoff account.

23 One note on the defendant's argument about the
24 Trustee having access to documents, as an initial matter,
25 the Trustee does not have a complete set of Fairfield's

1 books and records. In fact, some of the documents defendant
2 submitted with its own motion were new to us.

3 Moreover, nothing using Rule 8(a) suggests that a
4 plaintiff should be required to offer proof at the pleading
5 stage if it has access to documents. To the contrary, the
6 cases on this issue do not demand that level of proof even
7 following discovery.

8 And I'll rest with that unless Your Honor has any
9 questions.

10 THE COURT: I don't. I'll have questions for Mr.
11 Lack about it, but not you.

12 MR. FEIL: Okay. I'll turn it over to my
13 colleague, Mr. Friedman then to address personal
14 jurisdiction.

15 THE COURT: Thank you. Mr. Friedman.

16 MR. FRIEDMAN: Good morning, Your Honor. My name
17 is Matthew Friedman and I'm an associate at Baker Hostetler.
18 On behalf of the Trustee I'd like to briefly respond to
19 Multi-Strategy Funds and Mr. Fourmaux's arguments on
20 personal jurisdiction.

21 Your Honor, Multi-Strategy Fund has argued that
22 each contact on its own is not enough for purposeful
23 availment. But within this liquidation, the Court in Picard
24 Bureau of Labor Insurance or BLI, found that several
25 contacts also present here, together establish purposeful

1 availment on the basis of an intention to invest with BLMIS
2 and U.S. listed securities.

3 Judge Lifland's decision in BLI is good law and by
4 itself, establishes personal jurisdiction in this case.
5 That said here, they're even stronger and additional
6 contacts than there were in BLI in the totality of the
7 circumstances.

8 Multi-Strategy Fund first subscribed in BLMIS
9 feeder funds in 1999, but for expanding their BLMIS
10 investment with a Sentry subscription in late June 2004.
11 Fairfield Greenwich Group or FGG who operated and controlled
12 Sentry labeled Multi-Strategy Fund a Madoff addict who
13 needed a fix.

14 And like in BLI, the contacts here underscore
15 Multi-Strategy Fund's intention to invest even more with
16 BLMIS. A couple of weeks after that first subscription
17 Mario Therrien, the president of Multi-Strategy Fund came to
18 New York in mid-July to meet with FGG regarding Multi-
19 Strategy Fund's Sentry investment. This is a key contact.

20 Multi-Strategy Fund is coming into the
21 jurisdiction to learn more about their Sentry investment.
22 In Walden as you heard Mr. Fourmaux today it's one of Multi-
23 Strategy Fund's main cases, that decision says that physical
24 presence isn't a prerequisite to jurisdiction, but it's
25 certainly a relevant contact.

1 That meeting also preceded Multi-Strategy Fund's
2 second subscription and their redemption and receipt of the
3 stolen customer property that the Trustee seeks to recover
4 in this action.

5 Following the July 2004 meeting, Multi-Strategy
6 Fund sent numerous e-mails to FGG that underscored their
7 emphasis on the amount. They asked for info that you've got
8 on Madoff, they asked how Madoff made money, and they asked
9 when Madoff was invested in a given month.

10 For his part, Mr. Therrien sent at least seven
11 inquiries regarding additional Sentry capacity and that led
12 to a second subscription ultimately in January 2005.

13 I want to briefly touch on the two subscription
14 agreements that you can see attached to Mr. Therrien's
15 declaration at Exhibits A and B. They're significant for
16 several reasons.

17 First, they both contain New York jurisdiction,
18 forum selection and choice of law provisions. Second, by
19 executing the subscription agreements, Multi-Strategy Fund
20 agreed to deliver subscription money to an HSBC account in
21 New York and they did so.

22 But third, and most importantly, Multi-Strategy
23 Fund attached a one page document on Multi-Strategy Fund
24 letterhead that designated a Bank of New York account in New
25 York. You can see this one page document at page 13 of both

1 Exhibits A and B to Mr. Therrien's declaration.

2 That Bank of New York account was used first for
3 sending subscription money to Sentry, but on top of that,
4 Multi-Strategy Fund directed FGG to use that Bank of New
5 York account for any Sentry redemption.

6 They also directed FGG to do that in their
7 redemption request, as you can see at Exhibit C to Mr.
8 Therrien's declaration and page 6 is that same one page
9 document. Ultimately, Multi-Strategy Fund used that Bank of
10 New York account for every Sentry transaction they engaged
11 in.

12 Keeping up the theme of the focus on Madoff, when
13 Multi-Strategy Fund redeemed in February 2005 it was because
14 as my colleague Mr. Feil has accounted, Mr. Therrien was,
15 quote, so scared of Madoff and the potential Ponzi scheme.

16 Now, when Mr. Therrien informed FTG that Multi-
17 Strategy Fund was redeeming from Sentry, he and the FGG
18 partner he spoke to, discussed the rumors about Madoff.
19 Your Honor, these contacts belie Multi-Strategy Fund's
20 argument that the Trustee is depending on imputing contacts
21 from Sentry, BLMIS or a bank. The Trustee has not alleged
22 or argued for alter ego or imputation from those entities.

23 As the Supreme Court said in Walden a defendant's
24 contacts with the forum state may be intertwined with those
25 transactions or interactions with the plaintiff or other

1 parties. All the contacts alleged in the amended complaint
2 are Multi-Strategy Fund's contacts, even if they're
3 intertwined with Sentry or BLMIS or a New York bank.

4 As in BLI, Multi-Strategy Fund invested in Sentry
5 with a specific purpose of having fund investments with
6 BLMIS in New York and in U.S. listed investments.

7 Multi-Strategy Fund was another Madoff addict that
8 subscribed to the additional access to Madoff. They asked
9 questions about Madoff and they redeemed because they were
10 so scared of Madoff and the potential Ponzi scheme. They
11 visited New York and used New York bank accounts to
12 subscribe and redeem.

13 Speaking of the New York bank accounts, I want to
14 respond to two new cases that Multi-Strategy Fund cites in
15 its reply, an argument that they make about correspondent
16 bank accounts.

17 Multi-Strategy Funds says they're not a bank and
18 the HSBC and Bank of New York accounts are not their
19 accounts. So in their view, the uses of these accounts
20 don't matter. But they're wrong.

21 Licci, Al Rushaid and other cases that analyze the
22 correspondent bank account issue don't focus on whether the
23 defendant is a bank, and they don't focus on who the account
24 belongs to. Rather, the key is whether the use of the
25 account was purposeful and volitional rather than passive.

1 One of the new cases that Multi-Strategy Fund
2 cites in its reply brief, Universal Trading v Tymoshenko
3 confirms that the purposeful aspect is key. In that case,
4 the Court dismissed because the only relevant contact was
5 use of a New York bank account, but there were no
6 allegations that the use was purposeful.

7 Here, Multi-Strategy Fund directed FGG to deliver
8 redemption payments to the bank of New York account in New
9 York. This is purposeful and volitional. To the extent
10 Multi-Strategy Fund claims that its identity as a non-bank
11 and its use of a third party bank account is dispositive,
12 we've cited several cases finding personal jurisdiction over
13 non-bank defendants that used third party bank accounts for
14 relevant transactions in New York.

15 For example, in SO Exploration versus Nigerian
16 National Petroleum, the non-bank defendant argued that it
17 didn't own the U.S. accounts that were used for the relevant
18 transactions. But the Court did not find that argument
19 persuasive, writing and I quote, the point is not whether
20 the defendant owns the account, it is that they made
21 purposeful use of them for reasons related to the underlying
22 dispute. That's 397 F. Supp. 3rd 323 at 346. That standard
23 is met here.

24 The correspondent bank account allegations are
25 just one of the places where Multi-Strategy Fund says, this

1 one contact alone isn't enough to constitute purposeful
2 availment. But that's not the test and that's not our
3 argument.

4 The defendant in BLI also argued that isolated
5 bank account uses standing alone were insufficient to
6 establish personal jurisdiction. But Judge Lifland rejected
7 that argument, because personal jurisdiction there was not
8 rooted in the mere existence or maintenance of those
9 accounts. The contacts here support finding personal
10 jurisdiction.

11 The Berdeaux v OneCoin case, which is also cited
12 in Multi-Strategy Fund's reply for the first time and I
13 believe Mr. Fourmaux quoted it today, that also confirms
14 that the test is the totality of the circumstances. That
15 quote that Mr. Fourmaux read and that they block quote in
16 their reply, that part's dicta, because the Court had
17 already held by that part of the decision that the totality
18 of the circumstances fell short of purposeful availment.

19 That holding makes sense because in that case,
20 there were far weaker contacts and distinguishable facts.
21 The only relevant contacts for the individual defendant in
22 that case were that the defendant was a New York admitted
23 lawyer, he was convicted of a crime in New York, and he
24 merely knew of a single wire transfer through a New York
25 bank account.

1 In Berdeaux, Judge Caproni wrote that there cannot
2 be a purposeful use of a bank account unless the defendant,
3 quote, played a role in routing the wire transfers to the
4 New York corresponding account. That's 2021 Westlaw,
5 4267693 at page 12 footnote 22.

6 Here, Multi-Strategy Fund played a major role.
7 They directed Sentry to use the Bank of New York account.
8 That's more than just moving money as Mr. Fourmaux labeled
9 it this morning.

10 Berdeaux is also notable because there's nothing
11 in that case that tie the use of the bank account to the
12 claims against the defendant. Here, by contrast, Multi-
13 Strategy Fund received a precise transfer that the Trustee
14 seeks to recover in that Bank of New York account.

15 Finally, in Berdeaux, the defendant didn't target
16 New York, or expect to be sued in New York. But here,
17 Multi-Strategy Fund specifically targeted Madoff in New York
18 and they signed subscription agreements with a New York
19 choice of law, forum selection, and jurisdiction provision.

20 Taking a step back, Your Honor, the contacts that
21 the Trustee has alleged surpass those relied on by Judge
22 Lifland on personal jurisdiction in BLI. Mr. Fourmaux said
23 this morning that BLI didn't address the issues Multi-
24 Strategy Fund raises. But personal jurisdiction was
25 squarely addressed, including some of the same cases that

1 are cited in the briefing here, and the Court consider
2 analogous facts.

3 Judge Lifland found personal jurisdiction over a
4 foreign entity that invested tens of millions of dollars in
5 Sentry with a specific goal of having funds invested with
6 BLMIS in New York. And with the intention of profiting from
7 that U.S. based investment.

8 The defendant in BLI knew, intended, and
9 contemplated that its Sentry investment would be transferred
10 to BLMIS in New York, to be invested in the New York
11 securities market.

12 Now, we spent pages in our opposition brief
13 discussing BLI in more detail and why it applies, so I won't
14 belabor the point here. But as in BLI, the Court should
15 find personal jurisdiction over Multi-Strategy Fund.

16 Multi-Strategy Fund has argued that BLI was
17 overruled, but they're wrong. Given that the Trustee is not
18 relying on imputation or alter ego, the only case they cite
19 that potentially overrules BLI is Walden. But Walden's
20 inapposite here. It's an intentional tort case that was
21 applying an effects test. Purposeful availment was not at
22 issue, and in fact, is never even mentioned in the decision.

23 In Walden, the Supreme Court found that there was
24 no personal jurisdiction over a police officer who merely
25 knew that the plaintiff was from Nevada. But he had no

1 other jurisdictionally relevant contacts there. By
2 contrast, Multi-Strategy Fund intentionally directed funds
3 to BLMIS through Sentry, which was a fund that they knew was
4 going to funnel investments to BLMIS.

5 They try to paint a picture as if they were simply
6 purchasing shares in a foreign fund and that foreign fund
7 was the one that invested their money with New York based
8 BLMIS. This is misdirection. It's actually the same
9 argument that BLI made, because -- it's the same argument
10 that BLI made, but Judge Lifland called it disingenuous,
11 because it isn't happenstance or a coincidence that BLI's
12 money or Multi-Strategy Fund's money ended up at BLMIS. It
13 was always their intention that it would.

14 The last argument I want to address is this idea
15 that Multi-Strategy Funds' New York contacts aren't related
16 to the Trustee's claim. In support, Multi-Strategy Funds
17 relies on a series of contract cases, where there is no
18 connection between the claim and the contract. That's
19 simply not this case.

20 The Trustee's claim arises from federal law, not a
21 contract, and he seeks to recover a subsequent transfer of
22 stolen customer property to Multi-Strategy Fund.

23 As an example of this argument, they cite two
24 cases that were also cited by the BNP Paribas defendants in
25 their motion to dismiss. Those two cases are Hill versus

1 HSBC and Hau Yin To versus HSBC.

2 In BNP Paribas, the bankruptcy court found that
3 those two cases had no bearing on the issue of personal
4 jurisdiction arising from the defendant's redemption as
5 investors in Tremont feeder funds that arose from the
6 defendant's New York contacts.

7 This was because a lack of personal jurisdiction
8 in Hill and Hau Yin To was based on merely incidental
9 contacts. Those contacts related to fulfilling a foreign
10 contract to provide custodial and administrative services
11 for feeder funds.

12 Here, this case does not involve a contract to
13 supply goods or services and there is no claim for breach of
14 contract or a common law. Each of the New York contacts
15 alleged in the amended complaint directly relates to the
16 Trustee's claim against Multi-Strategy Fund.

17 In Ford Motor Company, the Supreme Court made
18 clear, that a causal relationship between the claim and the
19 contacts is not required. Instead, there need only be a
20 relatedness between the transaction and the legal claim,
21 such that the latter is not completely (indiscernible) from
22 the former. That's a quote from Licci 2, 732 F3d 161 at 168
23 to 169.

24 Multi-Strategy Fund's New York contacts underscore
25 their purpose and intent to invest with BLMIS in New York.

1 These contacts directly relate to Multi-Strategy Fund's
2 redemption and their receipt of more than \$25 million of
3 stolen customer property. They therefore relate to the
4 Trustee's claim to recover that money for the benefit of the
5 estate.

6 Unless Your Honor has any questions, I'll turn it
7 over for rebuttal unless Mr. Feil has something to add.

8 MR. FEIL: Your Honor, I just wanted to address
9 your question about Kingate. You're right, we do cite the
10 Kingate at the beginning of our complaint and that's just --

11 THE COURT: (indiscernible)

12 MR. FEIL: I'm sorry, that's just to note that the
13 defendant also received transfers from Kingate, that the
14 Trustee had dropped those claims because he reached a full
15 recovery in the settlement with Kingate.

16 THE COURT: Okay. Thank you.

17 MR. FEIL: You're welcome.

18 THE COURT: Okay. I have a couple of questions,
19 Mr. Lack, this is your question.

20 MR. LACK: Yes.

21 THE COURT: In Case 109 -- excuse me 09-01239 in
22 the Corina Piedrahita case, knowledge was relevant because
23 that was an initial transfer. And for -- in Fairfield and
24 good faith prior to the Second Circuit's agenda, it's not
25 relevant for the subsequent transfer, and for the safe

1 harbor defense. I want you to talk to me about that,
2 because that's my opinion.

3 MR. LACK: Right, exactly, Your Honor. And it is
4 true --

5 THE COURT: Initial as subsequent, talk to me.

6 MR. LACK: Yes, absolutely.

7 It is certainly true, Your Honor, that you looked
8 at the knowledge of Ms. Piedrahita and other officers and
9 agents of Fairfield Funds --

10 THE COURT: Right.

11 MR. LACK: -- in order to determine whether their
12 knowledge could be imputed to Fairfield as an initial
13 transferee. And you found that in fact, not with respect to
14 Ms. Piedrahita, but with respect to all the other
15 individuals who were officers and agents. You found that
16 they did have, they were adequately alleged to have known
17 that Madoff was not trading securities. Their knowledge
18 could be imputed to the Fairfield Funds, therefore,
19 Fairfield Funds had actual knowledge and they could not
20 invoke the safe harbor as initial transferee.

21 But if the Trustee's theory had been correct, you
22 would have stopped there and say, well now that I've found
23 that the initial transferee Fairfield Sentry and other
24 Fairfield Funds cannot invoke the safe harbor, that disposes
25 of all the subsequent transfer claims because they can't

1 invoke the safe harbor either.

2 But you didn't do that, you dismissed the
3 subsequent transfer claims against Ms. Piedrahita. And the
4 only basis we submit you could have done that on was Section
5 546(e). And the reason we say that is because with respect
6 to the good faith defense, it was also asserted by the
7 subsequent transferees, you held that because the defendants
8 had the burden of proving value as an element of the good
9 faith defense, that you could not address the good faith
10 defense on a motion to dismiss.

11 And therefore, the only basis we submit this Court
12 could have had to dismiss the claim, subsequent transfer
13 claim that Ms. Piedrahita is 546(e).

14 Now, Mr. Feil noted that there were some
15 transfers, subsequent transfers to Ms. Piedrahita within two
16 years of the petition date. And he asked well how could
17 they have been under 546(e).

18 There may be a question as to those transfers,
19 Your Honor, but there were other transfers that were beyond
20 the two year period. And as to those, we submit, the only
21 basis on which this Court could have dismissed the
22 subsequent transfers against Ms. Piedrahita was 546(e). And
23 therefore, to be consistent with Your Honor's decision in
24 Fairfield Investment Fund, which we think was correct
25 because Ms. Piedrahita did not have actual knowledge

1 alleged. She should not have been deprived of the safe
2 harbor. To be consistent with Your Honor's decision in
3 Fairfield Investment Fund, to be consistent with Cohmad, you
4 should dismiss the claim against Fairfield -- against Multi-
5 Strategy Fund.

6 THE COURT: I think you're misreading it. That's
7 not correct. I dismissed on good faith. So okay.

8 MR. LACK: Well --

9 THE COURT: Anything else you wish to rebut? I've
10 heard you. Anything else you wish --

11 MR. LACK: Okay. Let me go back and -- because --
12 let me go back to the basic argument that Mr. Feil made. He
13 says basically that Multi-Strategy as a subsequent
14 transferee, under Cohmad steps into the shoes of the initial
15 transferee. That is not correct. Okay. It's not correct
16 as a statutory basis, it's not correct under Cohmad.

17 Section 546(e) and Section 550(a) refer to
18 avoidability of the transfer, not the liability of the
19 transferee. 550(a) does not say if the initial transferee
20 is liable, then the subsequent transferee is also liable.

21 And the finding -- determining factor in Cohmad
22 was the actual knowledge of the transferee who was being
23 sought to be recovered against as the defendant.

24 Now, Judge Rakoff clearly did not hold that the
25 ability of the subsequent transferee to invoke the safe

1 harbor depends on the initial transferee. Paragraph 2 of
2 his ruling says just the opposite. Even if the initial
3 transferee is innocent, that doesn't mean the subsequent
4 transferee necessarily didn't invoke the safe harbor. The
5 determinate is the actual knowledge of the particular
6 transferee being sued.

7 And I'd like to note that Section 546(e) reflects
8 Congress' determination to protect the legitimate
9 expectations of people engaging in securities transactions.
10 The Second Circuit has been very clear about that. The
11 Second Circuit's been clear that it holds the safe harbor,
12 even in situations where someone might have said, well, they
13 should have an exception, you should have an exception, the
14 Trustee argued in the Madoff case, because it was a Ponzi
15 scheme, and because Madoff wasn't actually trading
16 securities. The Second Circuit said no, we're enforcing
17 Section 546(e) as written as Congress intended.

18 And so here, Judge Rakoff looked at exactly those
19 legitimate expectations and drawing the line in Cohmad. He
20 said that where the transferee knows, actually knows that
21 there are no securities contracts because Madoff is not
22 trading securities, then they can't invoke the safe harbor,
23 because they have no legitimate expectations.

24 But that rationale applies where the subsequent
25 transferee did have a legitimate expectation as Multi-

1 Strategy did. And a legitimate expectation that Madoff had
2 to secure these contract with Sentry and it had a -- Multi-
3 Strategy had a securities contract with Sentry itself. And
4 therefore, there is no -- it would be flouting Congress'
5 intent under Section 546(e) to deprive the subsequent
6 transferee, in that situation, of the use of the safe
7 harbor. And it's a safe harbor again as to the initial
8 transfer.

9 We're not saying, and this is the strawman
10 argument that Mr. Feil repeats here, we're not saying that
11 the Section 546(e) applies directly to subsequent transfers.
12 It protects the initial transfer. It protects the initial
13 transfer because he admits and does not dispute, for
14 example, that Sentry was a financial institution. Doesn't
15 dispute that Madoff was a stockholder. He doesn't dispute
16 there were securities contracts and settlement payments
17 here.

18 All he basically says is that the knowledge of the
19 initial transferee can be a transfer over to the subsequent
20 transferee and thereby, depriving the safe harbor of someone
21 who had a legitimate expectation based on the fact that
22 someone else didn't have a legitimate expectation. And we
23 don't think that is consistent with Congress' intent.

24 THE COURT: Okay.

25 MR. LACK: Let me say one other thing about -- in

1 response on the customer property side, because Mr. Feil
2 repeated a misrepresentation he made in his opening brief
3 that we had responded to in footnote 3 of our -- I'm sorry,
4 a misrepresentation in his amended complaint, which we
5 responded to in footnote 3 of our opening brief.

6 He said that we stipulated that customer property
7 was received. That is not true at all. I have the
8 stipulation here which he's referring to. It's ECF 88 and
9 the language that we said was, the remaining Count II of the
10 complaint as to CDP is dismissed, without prejudice, based
11 on defendant's representation that Multi-Strategy and not
12 CDP received the transfer from Fairfield Sentry Limited. It
13 says nothing about customer property.

14 So it is incorrect to suggest that we have in any
15 case -- any instance stipulated or admitted that we received
16 customer property. The evidence -- and we're not talking
17 about the evidence that we came up with, the evidence
18 proffered in the complaint and its exhibits in our case, in
19 the Fairfield, the second amended complaint which is
20 incorporated by reference into our case, complaint. In the
21 other complaints, all of these pleadings say, allege that
22 the transfer, subsequent transfers made from Sentry were all
23 Madoff customer property.

24 On a motion to dismiss, it is 100 percent
25 appropriate to hold the plaintiff to what they plead in

1 their complaint. And if the complaint and its exhibits
2 plead them out of a claim because it renders on its face the
3 claim implausible, then the motion to dismiss must be
4 granted under Iqbal and Twombly. That's exactly what has
5 happened here.

6 And I can say that there -- the defendant -- the
7 Trustee has had four opportunities to show this Court how it
8 could be that the \$25.8 million that Multi-Strategy received
9 was linked to customer property. Because he didn't do it in
10 the initial complaint, after we pointed out the
11 implausibility of it through the arithmetic exercise of my
12 initial declaration in the initial motion, they filed an
13 amended complaint, they didn't do the linkage in the amended
14 complaint.

15 After we pointed it out again in our renewed
16 motion to dismiss, they did not do it in their opposing
17 brief and they did not do it in oral argument today. They
18 claim they don't have to do it.

19 Well, in our case, I think it's clear from what
20 they've actually alleged and in Multi-Strategy's case we can
21 make this case within the four corners of the complaint and
22 the documents of the complaint incorporates by reference.
23 It is simply implausible that the Madoff -- any Madoff money
24 went to Multi-Strategy. It was all borne based on what the
25 Trustee himself has alleged, and we can hold him to that,

1 and Your Honor should hold him to that.

2 And that is -- it's not our obligation to explain
3 where the money would have come from, otherwise, although we
4 do have a good explanation based on what Fairfield Sentry
5 said elsewhere, but it is his, the Trustee's obligation to
6 make a plausible case. He has simply not done it with
7 respect to Multi-Strategy, and therefore, the motion should
8 be --

9 THE COURT: Okay. Mr. Fourmaux, I have a question
10 for you.

11 MR. FOURMAUX: Yes, Your Honor.

12 THE COURT: Did Multi-Strategy sign -- oh, wait a
13 minute, one thing I think this is for both of you. Did
14 Multi-Strategy sign off on the case that was consolidated
15 before Judge Rakoff?

16 MR. LACK: Cohmad, Your Honor?

17 THE COURT: Yes. Yes.

18 MR. LACK: Yes. Multi-Strategy was one of the
19 parties that sought to withdraw the reference in Cohmad --

20 THE COURT: Okay.

21 MR. LACK: -- and therefore we believe Cohmad is
22 applicable to our case.

23 THE COURT: I hear you. I just wanted to know the
24 answer to that question and it was a yes or no question.

25 Thank you.

1 Now then, Mr. Fourmaux, I have a question for you.

2 MR. FOURMAUX: Sure.

3 THE COURT: And it is the Supreme Court decision
4 in Walden. And in the Supreme Court decision to Walden,
5 which I'll quote it, you argue it pretty forcefully, but I
6 want to quote from that case and I want you to answer this.

7 MR. FOURMAUX: Uh-huh.

8 THE COURT: Although physical presence in the
9 forum is not a prerequisite to jurisdiction, physical entry
10 into the state, either by the defendant in person or through
11 an agent, goods, mail or some other means is certainly
12 relevant, please address that.

13 MR. FOURMAUX: Sure, Your Honor. There is only
14 one physical entry alleged in this case and that is --

15 THE COURT: Well, let's talk about all the other
16 stuff.

17 MR. FOURMAUX: Okay. Your Honor -- okay. You
18 were going to physical presence so if I --

19 THE COURT: I didn't --

20 MR. FOURMAUX: I'll just start with the --

21 THE COURT: (indiscernible) --

22 MR. FOURMAUX: -- physical entrance.

23 THE COURT: You just wanted to hear physical
24 presence.

25 MR. FOURMAUX: Okay.

1 THE COURT: You didn't hear about all the other
2 mail, such as e-mail, and other means. Talk to me.

3 MR. FOURMAUX: Sure, okay. First, the meeting in
4 New York after the subscription agreement is already signed,
5 after we're already a shareholder.

6 Not every -- yes, physical presence can be
7 relevant sometimes, but not every physical presence, not
8 every meeting is a jurisdictional contact.

9 So for instance, in the McKee case from the New
10 York Court of Appeals that we cite, that involved a meeting
11 in New York where the parties discussed the contract that
12 was in dispute. That one meeting, the New York Court of
13 Appeals held that does not constitute a transacting of
14 business.

15 The Court went so far as to say that it wasn't
16 just a minimal, it wasn't even a minimal contact, it was an
17 infinitesimal contact. It was not enough to constitute
18 transacting business in New York.

19 The cases are very clear that isolated meetings,
20 if there's no transaction conducted, there's no negotiation
21 of a further transaction and there's no allegation of that
22 here, than the mere presence in New York is not sufficient.

23 As far as the e-mails and phone calls, though,
24 these are also e-mails and phone calls after the Multi-
25 Strategy is already a shareholder in Sentry and there's two

1 lines of authority that are absolutely applicable here that
2 settle discretion dispositively.

3 First, there's the Hill and Halian Taul cases
4 which were mentioned just a little bit ago and those are
5 cases where if you have a foreign defendant and a contract
6 that is negotiated and executed outside of the United
7 States, then if there are communications from the foreign
8 location into New York and also payments to and from New
9 York, if it's all incidental to the fulfilling that contract
10 that was negotiated and executed outside of the United
11 States, then it does not support jurisdiction.

12 Now, they said well, oh, but BNP Paribas already
13 dealt with that and ruled that that is not -- that that line
14 of cases is not non-applicable to any investor in the feeder
15 funds. Absolutely incorrect, Your Honor.

16 BNP was decided on its facts. In BNP there were
17 foreign defendants; however, they had an office right here
18 in New York, 787 7th Avenue. And the subscription
19 agreements in that case were signed in New York by personnel
20 of the defendant in New York.

21 So you had an agreement that was executed in New
22 York, beyond -- so the predicate for -- the necessary
23 predicate for the Halian Taul and Hill cases was missing in
24 that case because it was negated by the facts. More than
25 that, the same defendants, employees in New York, also

1 advantaged the investment, so that the entire situation in
2 BNP was people at 787 7th Avenue dealing with people in
3 Westchester County. That's why those cases didn't apply.

4 Here, the Trustee concedes that the contracts were
5 negotiated and executed outside of the United States.
6 That's one line of authority. There's another line of
7 authority that's even longer, that goes back to 1970 from
8 the New York Court of Appeals, and that's the Parke-Bernet
9 case that's been consistently applied for 50 plus years.

10 And that's if you are outside of New York and
11 you're making a phone call or some other telecommunication
12 into New York, that unless you are transacting business on
13 that call, it doesn't count as a jurisdictional contact.

14 So that the classic case was, in part, Bernet was
15 there was an auction, an art auction taking place in New
16 York. And in the auction room they turn on the speakerphone
17 and a defendant in California places bids over the
18 speakerphone. And the Court -- then after he doesn't pay
19 for his winning bids and he gets sued in New York.

20 The Court says, well, okay, you weren't in New
21 York, but you projected yourself into commerce in New York
22 over the telephone. Following that case it's -- there's
23 just dozens and scores of cases, and we cited cases that
24 collect them, that say, you know, if you have a phone call,
25 you have an e-mail, but there's no business -- there's no

1 transaction conducted or negotiation, then that -- those
2 incidental communications do not qualify as a contact.

3 And so I -- and I think this is your -- a case,
4 Your Honor, of lots of zeroes don't add up to something more
5 than zero. I know they want you to look at the cumulative
6 impact, but I think that you have here a series of contacts
7 that count for nothing.

8 Now, if I may just quickly on the BLI case again,
9 what we really have here is presented as a strawman. They
10 want to pretend that all we're doing is saying the same
11 thing, that the defendant said in BLI. So I just want to
12 make absolutely clear, Your Honor, absolutely clear. We are
13 not saying that it was just a coincidence the money -- or
14 that we were surprised that the money ended up with Madoff.

15 We're not disputing that the defendant knew and
16 intended for the purposes of this motion, we're not
17 disputing that the defendant knew and intended that its
18 money would eventually go through Sentry into Madoff.

19 The argument that we we're presenting is that that
20 is not legally sufficient to constitute contact because it's
21 not legally sufficient under very well established case law
22 to impute Sentry's act of investing with Madoff to us, even
23 if we knew about it and even if we intended it.

24 So they say, we admit that it's not an alter ego,
25 we admit that it's not an agent. Agency would require not

1 just knowledge and intent and to benefit for the shareholder
2 but also control. And they have not alleged that, and I
3 think they just admitted that they aren't alleging all of
4 those elements.

5 So without that, the fact that you invested, even
6 knowingly and intendingly through another corporation
7 doesn't make us jurisdictionally present in New York.

8 Now, Mr. Friedman also talked about bank accounts
9 and just very quickly, he points to a subscription agreement
10 and he says, well, look, let's look at the wire transfer
11 instructions.

12 So in the subscription agreement Sentry gave its
13 wire transfer instructions for payments that would go into
14 Sentry and Multi-Strategy gave its wire instructions for
15 payments that would go to Multi-Strategy.

16 And in the wire instructions for Sentry, they list
17 that HSBC USA bank account in the name of Citi -- Citco Bank
18 Netherland N.V. Dublin branch. And then it specifically
19 says for further credit to account name Fairfield Sentry and
20 against an account number.

21 So the HSBC USA pay account in New York is just
22 for routing to the ultimate destination to Fairfield Sentry
23 in the Dublin, Ireland branch of Citco. There's no claim
24 that Sentry itself has the HSBC account. All they're doing
25 is informing persons that if you're going to send a wire

1 transfer to us in Ireland, our bank Citco works through
2 HSBC. Same thing for the Multi-Strategy fund wire transfer
3 instructions.

4 It says very clearly, this is in Therrien Exhibits
5 A and -- A and B, there's wiring instructions, pay through,
6 those are the words, Your Honor, pay through bank, Bank of
7 New York and gives an account number. Then says for further
8 credit to beneficiary's bank, Caisse Centrale Desjardin,
9 beneficiary's name, Multi-Strategy Fund and it gives the
10 account number.

11 So there is -- the money is only passing through
12 the accounts that are maintained not by Sentry and not by
13 Multi-Strategy, but by their perspective banks.

14 Now, Mr. Friedman talked about a volitional act,
15 well -- he says, well, you went ahead and put that
16 information down there in the subscription agreement that's
17 a volitional act. It's not a volitional you're Your Honor.
18 We did not choose that our bank would have that particular
19 corresponding account. It's not a volitional act here, Your
20 Honor, it's an informational act.

21 All we do is informing for the convenience of our
22 counterparty here is the bank that our -- here's the
23 correspondent bank that our bank uses. But the transfer
24 itself is from Ireland to Canada and from Canada to Ireland.
25 And the case law that's rehearsed again in the Berdeaux

1 decision, Judge Caproni makes a survey of the law and
2 concludes that there's no support for the idea that if
3 you're just a customer and the -- you're making a transfer
4 from one foreign location to another foreign location and
5 your banks that you use route through New York on the way,
6 that's not purposefully availing yourself of the privilege
7 of doing business in New York.

8 And just to be very clear, they said -- Mr.
9 Friedman said well, you received the redemption payment in
10 the HSBC account. No, Your Honor, absolutely not. HSBC
11 account, or my apologies, the Bank of New York account.
12 Says well, you received the redemption payment in the Bank
13 of New York account. No.

14 The Bank of New York account again as it's clearly
15 stated is an account held by Desjardin Bank. When money
16 went into Desjardin's bank account at Bank of New York,
17 Multi-Strategy didn't receive that. The only person who had
18 that money at that point was Desjardin Bank. It is not
19 until Desjardin Bank then credits Multi-Strategy's account,
20 at Multi-Strategy's account at Desjardin in Montreal.
21 That's when Multi-Strategy Fund receives the redemption
22 payment.

23 The -- Multi-Strategy Fund had no right to
24 withdraw money from correspondent account owned by Desjardin
25 Bank. Now, he says, oh, but we cited cases that shows that

1 you don't have to own the account. Absolutely false, Your
2 Honor.

3 So he mentioned the SO versus Nigerian case, the
4 Nigerian Oil case, very important. That case, the facts
5 there were there's a breach of contract action against the
6 Nigerian state oil company which was found to be an alter
7 ego of the Republic of Nigeria. And the situation there was
8 it's the Nigerian state oil company.

9 The Central Bank of Nigeria opens three accounts
10 at JPMorgan in New York for the benefit of the Nigerian
11 state oil company for the purpose of the Nigerian state oil
12 company to use.

13 The opinion cites that the Nigerian state oil
14 company received bank statements for those accounts and that
15 it had the authority on its own to transfer money out of
16 those accounts.

17 So it was a case where the accounts were nominally
18 held in the name of the Central Bank of Nigeria, but they
19 were controlled by the Nigerian state oil company. And it
20 was in that context where the Nigerian state oil company in
21 fact controlled the accounts, that -- the Court said, well,
22 it doesn't matter whose -- you don't get out of this by
23 saying your name isn't on the account. That's completely
24 different, Your Honor, in the situation with Multi-Strategy
25 Fund.

1 Multi-Strategy Fund doesn't have any control of a
2 Desjardin's account with Bank of New York. That's the same
3 account that any customer of Desjardin Bank, any customer at
4 Desjardin Bank that makes a U.S. dollar wire transfer is
5 going to have their money cashed to that account. But none
6 of the customers control that account.

7 So all we're doing in the subscription agreement
8 is informing a counterparty of that fact. If we had not
9 listed the correspondent accounts, the exact same thing
10 would have happened. If we had just given our -- if we had
11 just our bank account number at Desjardin Bank and gave that
12 as the wire transfer instructions, the same thing would have
13 happened.

14 All that would have happened in that case is
15 someone at Citco Bank would have to look up on the Swiss
16 system, who's the correspondent account for Desjardin. And
17 the same transaction would have happened. We had no control
18 over it. All we're doing is essentially saving somebody at
19 a bank a few minutes of looking up a -- the correspondent
20 account number.

21 So last, if I may, the -- on relatedness. Again -
22 - so for a number of these contacts it's obviously -- it's
23 not enough that there be -- remember there are two parts to
24 specific jurisdiction. There has to be a contact that
25 constitutes purposeful availment and the claim must arise

1 out of or relate to those contacts.

2 Here, there's no showing or allegation of well how
3 did the fact that money going from Ireland to Canada, how
4 did the fact that it went midway through New York, how does
5 that relate in any way causally, logically, in any way
6 whatsoever to whatever Madoff was running the Ponzi scheme,
7 to whether Madoff made a fraudulent transfer, or to whether
8 we received customer property?

9 Everything in their claim would be exactly the
10 same if the money had been routed in some other way or if we
11 had --

12 THE COURT: I've heard you already. I've heard
13 enough.

14 MR. FOURMAUX: Okay.

15 THE COURT: You're beginning to repeat yourself
16 and I --

17 MR. FOURMAUX: All right.

18 THE COURT: -- really get tired of repeating --
19 repeat.

20 MR. FOURMAUX: Okay. Then if you have no other
21 questions, I'll rest, Your Honor.

22 THE COURT: I do not have any other questions.

23 MR. FOURMAUX: Thank you.

24 THE COURT: Mr. Feil, Mr. Friedman, any quick
25 response, and it better be exactly on point and a quick

1 response.

2 MR. FEIL: Yeah, I'll just say in response to Mr.
3 Lack, I did not say that they stipulated that the subsequent
4 transfer had customer property just that they had received
5 it. You can see in the transcript.

6 With respect to his contention that Congress is
7 intending to protect the entire chain of transfers, it's
8 true that Congress has amended the safe harbor and the
9 Courts have interpreted it liberally, but nobody, Congress
10 hasn't seen fit to add 550 to it. And I think Your Honor
11 gets that.

12 THE COURT: I knew that.

13 MR. FEIL: Okay. That's all I had.

14 THE COURT: Very good. Mr. Friedman, same thing,
15 any quick things that were brought up that were not argued
16 before that you just want to quickly address?

17 MR. FRIEDMAN: No, thank you, Your Honor, I think
18 we addressed everything. Thank you for your time.

19 THE COURT: Excellent. Very good. The Court will
20 issue a written decision and I am going to take a five
21 minute break before we begin the next one.

22 (Recessed at 11:42 a.m.; reconvened at 11:49 a.m.)

23 THE COURT: Good morning still.

24 UNIDENTIFIED: Good morning, Your Honor.

25 UNIDENTIFIED: Good morning.

1 THE COURT: Oops. I keep turning myself off and
2 on. This is -- we're now on Adversary Proceeding 11-02149,
3 the Trustee Picard versus Banque SYZ & Company, SA. State
4 your name and affiliation.

5 MR. LEVIN: Good morning, Your Honor, Richard
6 Levin, Jenner & Block LLP appearing for Banque SYZ.

7 MR. CREMONA: Good morning, Your Honor, Nicholas
8 Cremona, Baker & Hostetler appearing on behalf of Irving
9 Picard as SIPA Trustee.

10 THE COURT: Mr. Levin, I believe this is your
11 motion.

12 MR. CREMONA: Your Honor, if I may --

13 THE COURT: Oh, I'm so sorry.

14 MR. CREMONA: Sorry to interrupt, I just wanted to
15 address a housekeeping matter at --

16 THE COURT: Go ahead.

17 MR. CREMONA: -- the outset, Your Honor, because
18 you had asked about the Kingate transfers in the Multi-
19 Strategy matter and the same applies here. I just wanted to
20 point Your Honor to a stipulation that we entered which is
21 at Docket 147 in this case, entered on December 12th, 2021.
22 And similar to the other case, we dismissed the Kingate Euro
23 transfers and the Kingate global subsequent transfers based
24 on the settlement and the recovery of those transfers. So
25 that's why there was an adjustment and they're not discussed

1 herein.

2 THE COURT: Okay. I have to say --

3 MR. LEVIN: Your Honor --

4 THE COURT: I'm sorry, Mr. Levin, the docket is
5 not so clean. So sometimes we're new to this and trying to
6 find it. It is not necessarily simple. So, yes, Mr. Levin.

7 MR. LEVIN: Yeah, and just to confirm what Mr.
8 Cremona said and --

9 THE COURT: Okay.

10 MR. LEVIN: -- noting that the stipulation did not
11 actually result in an amended complaint. The complaint
12 still has all of the Kingate allegations in it.

13 THE COURT: Okay. Okay. But let me just ask Mr.
14 Cremona. But isn't there a stipulation on the Multi-
15 Strategy or just an amended complaint?

16 MR. CREMONA: On Multi-Strategy I'll defer to Mr.
17 Feil. I don't know whether or not there was a stipulation
18 or if that was addressed in the complaint. In -- as Mr.
19 Levin said, in this action we stipulated solely to the
20 dismissal of the transfers that relate to Kingate and that's
21 all we accomplished with the stipulation that I referred to.

22 THE COURT: Okay. All right.

23 MR. LACK: Your Honor? Your Honor?

24 THE COURT: Yes, sir.

25 MR. LACK: In the Multi-Strategy case, at Document

1 88, there is a stipulation which does dismiss the Kingate
2 related claims and then there was an amended complaint which
3 was in accordance with that and did not include the Kingate.

4 THE COURT: I'm sorry to take y'all's time on
5 this. We're just trying to get everything straightened out.
6 Very good. Mr. Levin, it's your motion.

7 MR. LEVIN: Thank you, Your Honor. Your Honor, I
8 know you're well prepared on these matters so before I
9 started, I wanted to know if there was anything specifically
10 you wanted me to address or any questions before I start my
11 prepared remarks.

12 THE COURT: Thank you. I tried to be prepared and
13 I actually want to hear you first and I think questions may
14 come up that I come back to you on, but let's just hear you
15 first.

16 MR. LEVIN: Fine. All right. I'll proceed.

17 THE COURT: And honestly, if y'all will -- not
18 necessarily emphasize but add to your papers, because we've
19 really gone over the papers.

20 MR. LEVIN: Yes, understood.

21 THE COURT: So if you'll -- right, thank you.

22 MR. LEVIN: Your Honor, the first issue, the first
23 item of business is we filed a request for judicial notice.
24 The Trustee did not object to that request so we ask that
25 judicial notice be taken of the documents that are a part

1 of that request.

2 THE COURT: That are on the docket already?

3 MR. LEVIN: Yes.

4 THE COURT: Okay. I can always take judicial
5 notice of something that's on the docket. I don't
6 necessarily have to take judicial notice of what's in the
7 docket -- in the document, so --

8 MR. LEVIN: Well, our request, Your Honor, spells
9 out exactly what we're seeking, it's a written request, it's
10 on the docket with all of the documents attached as exhibits
11 to the request and it spells out exactly what we are seeking
12 judicial notice of, whether it is the existence of the
13 document, or in some cases, the contents of the document.

14 MR. CREMONA: Your Honor, sorry to interrupt --

15 THE COURT: Yes, sir?

16 MR. CREMONA: -- this is Nicholas Cremona, I
17 apologize for interrupting. But while we did not object to
18 the concept of matters being taken on judicial notice, we
19 intend to address here today the purpose for which those
20 documents can or cannot be used and the appropriateness on a
21 motion to dismiss, which I intend to address in my
22 presentation.

23 THE COURT: Okay. I -- that's what's important to
24 me. Obviously I take judicial notice of anything that's
25 filed. But a judicial notice can't be used for the truth of

1 the matter asserted and that's just blanket.

2 I can take judicial notice of -- if it's been
3 filed. I can take judicial notice of it's here. And I will
4 do that, but that's just that it's filed and it's before the
5 Court. Very good.

6 MR. LEVIN: Your Honor, I don't want to beat this
7 too much, but for example, the motion to dismiss assumes the
8 facts in the complaint to be true and similarly --

9 THE COURT: I have to. I have to.

10 MR. LEVIN: Yes, yes. And we're -- similarly,
11 we're assuming the documents that are referenced in the
12 complaint, which we ask the Court to -- which are attached
13 to our request for judicial notice, we assumed those to be
14 true.

15 THE COURT: I cannot do that. That's not what the
16 law says and you know that's not what -- excuse me. That's
17 not what it says. That sounds like evidence to me and if
18 that's evidence, we will be in the courtroom and the
19 evidence will be there.

20 I take judicial notice of the fact that the
21 document was filed, that's all I will do. And, yes, you may
22 rebut it, but I'm taking judicial notice of the fact that
23 it's been filed.

24 MR. LEVIN: I will not go over our request in
25 detail, Your Honor, I'll let the written request speak for

1 itself.

2 THE COURT: Thank you.

3 MR. LEVIN: Your Honor, I want to address a
4 preliminary issue before getting into the grounds that we
5 have asserted for our motion to dismiss.

6 We have five grounds unlike Multi-Strategy, we
7 overlap on three of them but there are two additional ones.
8 But there's a preliminary issue that I want to mention and I
9 think this is really important understanding the context of
10 this case.

11 This case is about -- this adversary proceeding is
12 about an investment that Bank SYZ made with Sentry, not an
13 investment that Bank SYZ made with BLMIS. The Sentry
14 offering memorandum which the complaint references stated
15 Sentry intended to use the funds to invest in U.S.
16 securities, that Sentry maintained an account at BLMIS,
17 which was a broker dealer, it needed to maintain an account
18 to trade in U.S. securities. And that BLMIS would manage
19 the investment, in effect be the investment manager.

20 Neither the complaint nor the facts as the world
21 now knows them support any theory that Banque SYZ or any
22 other Sentry investor who did not have actual knowledge that
23 BLMIS was not trading securities, was investing with BLMIS
24 or in BLMIS as if BLMIS were a fund in which one could
25 invest.

1 Anymore than if I might call a broker at Charles
2 Schwab and send money with instructions to buy shares of
3 Apple or General Motors or any other U.S. securities, I'm
4 investing in Charles Schwab, I'm not. And even if my broker
5 there steals all my money, I still didn't make an investment
6 in Charles Schwab.

7 An here, the Sentry -- Banque SYZ was investing in
8 Sentry and Sentry was using the money that it got from all
9 of its investors to invest in U.S. securities using BLMIS as
10 its broker dealer and effective events manager.

11 The Second Circuit recognized this distinction in
12 the Ida Fishman case. And I'm going to quote on page 421 of
13 the Fishman case. The account documents establish that
14 BLMIS and its customers manifested their mutual assent that
15 BLMIS would conduct securities transactions on the
16 customer's behalf pursuant to specific investment strategy.
17 Now, here the customer BLMIS with Sentry, not Banque SYZ.

18 Going on with the quote, of course, BLMIS secretly
19 intended to violate the agreement by using the deposits to
20 fund the ongoing Ponzi scheme, but this is of no moment.
21 This was talking -- getting to the point of whether Fishman,
22 in that case it was a 546(e) case.

23 And this distinction is important to remember when
24 analyzing the relationships among BLMIS, Sentry and Banque
25 SYZ. Banque SYZ was an investor in Sentry.

1 Did you just turn your camera off or --

2 THE COURT: I did accidentally, thank you, I
3 apologize.

4 MR. LEVIN: Okay. No problem.

5 THE COURT: I'm struggling with making this camera
6 work.

7 MR. LEVIN: Well, I don't mind if it's off, I just
8 wanted to make sure I wasn't -- I shouldn't --

9 THE COURT: No, I want you to read my tells.

10 MR. LEVIN: I looked for those.

11 THE COURT: I'll leave it on.

12 MR. LEVIN: Okay. So this distinction is
13 important to remember when analyzing the relationships among
14 to BLMIS and Sentry and Banque SYZ. SYZ was an investor in
15 Sentry and Sentry obtained investors such as Banque SYZ on
16 the basis that Sentry was an investor in U.S. securities,
17 not in BLMIS. That turned out not to be true at the end of
18 the day, but at least that's what Sentry represented to its
19 investors.

20 And to the extent that the Trustee argues that
21 Sentry was not investing in U.S. securities because it knew
22 BLMIS -- Sentry was not investing, because it knew BLMIS was
23 not investing in U.S. securities. That's the allegation in
24 the Fairfield amended complaint.

25 The Second Circuit's statement applies equally.

1 Sentry agreed with its investors, including Banque SYZ that
2 it would invest in U.S. securities, whether it secretly
3 intended to violate that agreement is of no moment.

4 So I want to set that as a context for the
5 arguments that I'm going to make. The first point, Your
6 Honor, is that as we said in our memorandum, the -- one of
7 the essential elements of an action to recover customer
8 property from a subsequent transferee is that the initial
9 transfer be avoidable.

10 And the complaint must sufficiently allege
11 avoidability or actually avoided. It's already been
12 avoided, but here, just avoidability. The only allegation
13 of substance of any -- other than just the bare assertion
14 that it's avoidable, that the initial transfers to Sentry
15 were avoidable is by incorporation by reference of the
16 Fairfield amended complaint.

17 There are three reasons why that is not proper in
18 this case. First, Rule 10(c) which permits incorporation by
19 reference does not permit wholesale incorporation from
20 another action and the incorporation must specifically
21 identify the allegations being incorporated, not all 217
22 pages, 798 allegations and 101 exhibits.

23 Second, this incorporated complaint has been
24 superseded. It's no longer operative and it's based on
25 superseded legal principles as we note from the Citibank

1 case.

2 And third, the incorporated complaint does -- now
3 this goes to Rule 8(a) which requires that a complaint
4 contain a short and plain statement, it does not contain a
5 short and plain statement of the claim. And it would expand
6 the scope of this litigation well beyond the main issues of
7 avoidability and recovery with extensive allegations and
8 exhibits that are irrelevant to the Trustee's complaint in
9 this action.

10 As such, we believe the wholesale incorporation
11 should be stricken with the result of the complaint against
12 Banque SYZ does not adequately allege that the Sentry
13 transfers from BLMIS were avoidable, which is an essential
14 element.

15 As we said in our reply brief, Your Honor, we do
16 not object to the Trustee's amendment of the complaint to
17 allege only the relevant facts to frame the issue for this
18 case. We just don't want to deal with all of their claims
19 against all of the Fairfield defendants. This relates only
20 to Sentry and only to the avoidability of the initial
21 transfers to Sentry.

22 I want to move to the second grounds for our
23 motion to dismiss, Your Honor, which is the safe harbor of
24 Section 546(e). I'm going to adopt Mr. Lack's arguments,
25 except to the extent they were specific to the facts of his

1 case, but on the general points I want to adopt those and
2 just add a few words without repeating, maybe a different
3 emphasis than he had.

4 The safe harbor, by its express terms, prohibits
5 avoidance and therefore recovery of transfers made more than
6 two years before bankruptcy. It's absolute. There are no
7 exceptions. And the Second Circuit has said we look askance
8 at any objections and has denied other attempts to find
9 exceptions to the safe harbor.

10 And that would end this litigation, since the
11 alleged initial transfers here, to the extent we can
12 determine which ones the complaint is referring to, were
13 made more than two years before bankruptcy.

14 But as the safe harbor has been construed in this
15 case by both Judge Rakoff and by this court, the -- there
16 has been an exception, a judicially created exception to the
17 safe harbor. And that exception is that the safe harbor
18 cannot be invoked by a transferee who had actual knowledge
19 that BLMIS was not trading securities.

20 We disagree with that ruling. We wish to preserve
21 the issue for appeal, but we recognize it's law of the case
22 so we're going to go on that basis for now, Your Honor.

23 Oh, and to answer your earlier question, Banque
24 SYZ was also a party to the Cohmad proceeding, so we are
25 bound by that as well in the case here.

1 THE COURT: I was thinking the same thing.

2 MR. LEVIN: Now, Judge Rakoff's judicially created
3 exception was narrow, and when a Court creates an exception
4 to a very absolute clear congressional command, that
5 exception should be construed very narrowly. And Judge
6 Rakoff made clear the reason for the exception was designed
7 to strip protection from those who knew there were no
8 securities transactions.

9 That applies equally to initial transferees
10 without knowledge and it should apply, if you take the logic
11 of his opinion creating this exception, it should apply
12 equally to subsequent transferees without knowledge. And
13 there's no allegation here that Banque SYZ knew there were
14 no underlying securities transactions.

15 In addition, going back to the Ida Fishman case
16 from the Second Circuit, it's 773 F3d 411, the Court ruled
17 that the phrase in connection with, quote, in Section 546(e)
18 sets a low bar for the required relationship between the
19 securities contract and the transfers sought to be avoided.

20 Because the Trustee here alleges that the
21 redemption payments that Banque SYZ received from Sentry
22 were customer property withdrawn from BLMIS to fund the
23 redemptions, the allegation is that the withdrawals were
24 transfers in connection with the securities contract between
25 Sentry and Banque SYZ. And as such, even if Sentry had

1 actual knowledge that BLMIS was not trading, the benefit of
2 the safe harbor here is for Banque SYZ who was the party to
3 a securities contract between it and Sentry.

4 I'll move on to the customer property issue, Your
5 Honor, and again I want to echo Mr. Lack's argument, except
6 with respect to the specifics of the transfer of Multi-
7 Strategy because our facts are a little bit different.

8 Despite the Trustee's exercise to frame this as a
9 tracing -- I'm sorry, the Trustee's attempt to frame this as
10 a tracing exercise, we do not believe this is a question for
11 expert opinion, but it's a legal question of not what the
12 facts are, that's for trial.

13 The question here is does the complaint plausibly
14 allege that the transfers in question contain customer
15 property. Because if the complaint doesn't plausibly allege
16 that, you don't get to trial. So the complaint has to make
17 plausible allegations.

18 First, in this case, first the Trustee doesn't
19 identify which of the initial transfers of customer property
20 were allegedly transferred to Banque SYZ. He simply lists a
21 bunch of BLMIS to Sentry transfers and does not tie any
22 initial transfers to any transfer from Sentry to Banque SYZ.
23 They're just broad generalities, no specifics and that is
24 not adequate under Iqbal and Twombly.

25 And second, in our case, there's an enormous time

1 gap that makes it implausible that the funds Sentry
2 transferred to Banque SYZ were customer property that Sentry
3 received from BLMIS.

4 If you look at page 33 of our memorandum, Your
5 Honor, we have a table which is a summary of the transfers
6 alleged just within the four corners of our complaint
7 without looking at the 70 some other complaints that the
8 Trustee has brought.

9 And this -- the plausibility problem here is that
10 as you can see from that table, BLMIS transferred money to
11 Sentry. Sentry transferred enormous amounts of money back
12 to BLMIS, comparable amounts and yet, somehow the Trustee
13 says it's plausible that despite a billion and a half
14 dollars of transfers from Sentry to BLMIS, that's before the
15 transfers to Banque SYZ, despite a billion and a half
16 dollars of transfers somehow, without saying how, without
17 any specifics, without any details, somehow Sentry set aside
18 some money of customer property that it received and it used
19 that money to pay Banque SYZ.

20 So if you expand this table to include the 70 some
21 other complaints as we explained in our memorandum, Sentry
22 transferred out over \$7 billion of money and took in from
23 BLMIS under \$3 billion of money.

24 So while it's conceivable that there was customer
25 property that found its way to Banque SYZ, Iqbal and Twombly

1 require more than conceivable, they require that it be --
2 that the claim be plausible that that was customer property.
3 And again without the details and we believe under the
4 Trustee's agreement with the Sentry liquidator, the Trustee
5 had access to the Sentry bank records to provide those
6 details. Without those details, the claim that Banque SYZ
7 received customer property is not plausibly alleged.

8 Again, we have no objection if the Trustee -- to
9 the Trustee amending its complaint if he can, to plausibly
10 allege that the funds that Banque SYZ received were customer
11 property, and to show the connection, we just say that he
12 hasn't done so so far.

13 Your Honor, I want to turn Section 550(b)(1),
14 which is an affirmative defense. And ordinarily, an
15 affirmative defense is not -- cannot be used on a motion to
16 dismiss. But if the complaint itself has adequate
17 allegations, which are accepted as true, that support the
18 affirmative defense, the Court may dismiss on the
19 affirmative defense. We made that point, we cited that in
20 our brief and cited the case law for that.

21 Now, the affirmative defense here 550(b)(1) gives
22 the subsequent transferee an affirmative defense if the
23 transferee takes three elements, takes for value, in good
24 faith, and without knowledge of avoidability of the transfer
25 avoided.

1 The first value, we address that in memorandum.
2 We believe there was adequate consideration for the transfer
3 between Sentry and Banque SYZ. That's what's required by
4 value here. I'm not going to spend anymore time on that.

5 But I want to focus on good faith for a moment.
6 Citibank decision last August defines what's required for
7 the good faith element. It has three components.

8 The first component is what facts the defendant
9 subjectively knew. The second component is whether those
10 facts put the transferee on inquiry notice of the fraudulent
11 purpose of the transfer.

12 And in this case, the transfer we're talking about
13 is the subsequent transfer from Sentry to Banque SYZ, just
14 as the value analysis is from Banque SYZ to Sentry. It's at
15 that level, that subsequent transfer level.

16 And the third element is if so, whether diligent
17 inquiry by the transferee, here Banque SYZ, would have
18 discovered the fraudulent purpose of the transfer, the
19 transfer being the transfer from Sentry to Banque SYZ.

20 Now, why do I say that that element is tested at
21 the subsequent transfer level, not at the initial transfer
22 level? Because the third element is, without knowledge of
23 the voidability of the avoided transfer. And the avoided
24 transfer is the transfer that occurs between BLMIS and
25 Sentry. That's directed at the initial transfer.

1 And that's how the statute picks up the subsequent
2 transferee who knew too much. If the subsequent transferee
3 had knowledge of the voidability of the transfer avoided,
4 then even if he was in good faith between the subsequent
5 transferee and the initial transferee, the subsequent
6 transferee will be liable.

7 So the statute itself separates those two
8 concepts. Turning to good faith and looking at good faith
9 at the Sentry to Banque SYZ level, it's Banque SYZ's good
10 faith in accepting the transfer from Sentry.

11 Going back to the Citibank test. The first two
12 elements of that test, subjective knowledge and whether that
13 would put a reasonable investor on inquiry notice are not
14 addressed in the complaint, and I don't propose that we can
15 address them here on a motion to dismiss.

16 But the third element, which must be met for the
17 good faith test, is whether a diligent inquiry would have
18 discovered the fraudulent purpose of the transaction.

19 That is purely a hypothetical test. Would have
20 discovered is hypothetical. It's not an actual what did
21 they discover. Obviously if the subsequent transferee had
22 actual knowledge of those securities transfers, of course
23 then they would have knowledge of avoidability of the
24 transfer, of the initial transfer.

25 But here, Citibank is looking at a hypothetical

1 test. And a hypothetical test is not subject to fact
2 discovery. As the Trustee's claim in his opposition that
3 there are myriad unknown facts critical to opposing a good
4 faith defense is wrong. It's based on pre-Citibank law,
5 which didn't impose this particular hypothetical test.

6 In this case, the complaint -- I'm going to assume
7 that the first two of two elements of the Citibank test are
8 met. And the only question is whether the third one. Here
9 -- assume without admitting of course.

10 However, the complaint here includes new --
11 numerous allegations about whether a diligent inquiry would
12 have discovered the fraudulent purpose of the transfer from
13 Sentry to Banque SYZ.

14 So the third element can be addressed now. The
15 complaint effectively alleges that if an investor had
16 conducted a diligent inquiry of Sentry, it would have found
17 -- it would not have found a fraudulent purpose in Sentry's
18 making the redemption payments.

19 Section 7.E of the Fairfield amended complaint,
20 which is incorporated by reference, of course, we're
21 assuming the incorporation is adequate for these purposes,
22 but we still maintain the Court should not permit the
23 incorporation. But if it is incorporated, Section 7.E is
24 headed, quote, the defendant's deceive their investors.
25 These are the Fairfield defendants. And it goes on for 12

1 paragraphs detailing the grave extent to which Sentry's
2 management prevented any investors from discovering anything
3 about Sentry's operations.

4 I've already addressed the third element,
5 knowledge avoidability which should be tested at the initial
6 transfer level. And in this case, there's no basis to
7 conclude that Banque SYZ could -- even could have known
8 about -- sorry, let me say that again.

9 There's no basis that Banque SYZ could even have
10 known about the avoidability of the initial transfers
11 because the Trustee doesn't even -- because there's no
12 allegation that the Trustee -- I'm sorry. I'm going to take
13 a breath, Your Honor.

14 THE COURT: Go ahead. But let me just ask you a
15 question then while you're taking a breath. Are you saying
16 that good faith is to Fairfield and knowledge is to BLMIS,
17 is that what you're saying to me?

18 MR. LEVIN: That's what 550(b)(1) says, good faith
19 -- took the transfer in good faith. Where did the transfer
20 come from? It came from the initial transferee, not from
21 the debtor. Took the transferee in good faith.

22 THE COURT: Okay.

23 MR. LEVIN: And took the transfer without
24 knowledgeability of the transfer avoided, which is the
25 initial transfer. So the statute itself distinguishes

1 between those two steps in the process. And that's what I'm
2 saying.

3 And here, the complaint does not allege that
4 Banque SYZ even could have known about the initial
5 transfers, that the Trustee alleges, let alone that they
6 might be voidable. So that third test is satisfied for the
7 affirmative defense.

8 Your Honor, I'll go on for just briefly one
9 additional issue. Even if good faith is tested by whether
10 Banque SYZ was in good faith with respect to Madoff. That's
11 not what the statute says, but I'm sure that's the Trustee's
12 position. That -- the statute requires actual knowledge,
13 not inquiry knowledge, not good faith, actual knowledge of
14 the voidability.

15 But if we assume otherwise that the good faith
16 applies at the initial transfer level, the complaint again
17 sets forth allegations to show that the -- Banque SYZ could
18 not have determined the fraudulent purpose of the transfers
19 as the Citibank case says.

20 Suppose for example, the Trustee had alleged in
21 his complaint that BLMIS was such an expert at concealing
22 his fraud that no one, no matter how expert an investigator
23 could have gotten through the web of lies and deceit to
24 discover the fraud. That would surely meet the Citibank
25 good faith test by establishing the diligent inquiry by the

1 defendant could not have discovered the fraud.

2 Now, we're not saying that the Trustee made such
3 categorical statements in his complaint, no. He did not.
4 Rather, he alleged that a thorough investigation by both an
5 independent hedge fund research and advisory firm and by the
6 SEC with its greater investigatory powers and subpoena
7 powers and regulatory powers did not discover the fraudulent
8 purpose of the transfers. And that's very close to saying
9 the same thing.

10 So on that basis, we believe that even if the good
11 faith is tested at the initial transfer level, rather than
12 knowledge avoidability being transferred at the initial
13 transfer level, that the affirmative defense is satisfied.

14 Finally, Your Honor, and I appreciate your
15 patience, I'd like to move on to personal jurisdiction.

16 THE COURT: Okay.

17 MR. LEVIN: Again, I want to adopt Mr. Fourmaux's
18 points with respect to imputation and with respect to the
19 subscription agreements on personal jurisdiction.

20 But let me start by saying that the complaint, any
21 complaint must contain specific allegations sufficient to
22 make it plausible that the Court has specific personal
23 jurisdiction over the defendant. It's not enough for the
24 plaintiff alleging conclusory terms, only the defendant had
25 minimum contacts or that defendant purposefully availed

1 itself of the laws and protections of the United States, in
2 the hopes that those allegations would permit discovery that
3 might reveal a basis for personal jurisdiction. Iqbal and
4 Twombly made clear, conclusory allegations are not
5 sufficient.

6 Here, with respect to the alleged subsequent
7 transfers, the Trustee alleges little more than that. In
8 paragraph 6 of the complaint, he says only, Banque SYZ
9 knowingly directed funds to be invested with New York based
10 BLMIS through Madoff feeder funds and Banque SYZ knowingly
11 received transfers of customer property from BLMIS by
12 withdrawing money from the feeder funds.

13 Now, those are conclusory allegations, especially
14 Banque SYZ knowingly received customer property from BLMIS
15 by withdrawing. That is a complete conclusory allegation,
16 no sufficient detail for that.

17 And therefore, they're inadequate. Their
18 formulaic recitation of the elements of personal
19 jurisdiction devoid of the specific facts necessary to
20 support them.

21 Now, I know Mr. Cremona filed the declaration, in
22 which he makes numerous other allegations, which are not
23 referenced in the complaint. And as we pointed out in our
24 papers, one may not amend the complaint by an opposition to
25 a motion to dismiss. If the Trustee needs to amend the

1 complaint, it should be through a proper amendment of the
2 complaint.

3 But, second, even if these allegations, these
4 broad conclusory allegations were true, the first allegation
5 would not support specific personal jurisdiction. And now I
6 go back to what I said in my opening remarks, Your Honor.

7 Banque SYZ invested in Sentry, a non-US legal
8 entity, not in BLMIS. Sentry did not invest with or in
9 BLMIS, at least it intended to invest in U.S. securities
10 using BLMIS as its broker dealer and Banque SYZ invested
11 only in Sentry, not BLMIS.

12 And the only reason we're here today is because
13 BLMIS reached its agreement with Sentry to invest in U.S.
14 securities resulting in this SIPA proceeding. It -- but it
15 must be the defendant's activities that give rise to
16 personal jurisdiction. The mere fact that Madoff breached
17 its agreement and defrauded thousands of people does not all
18 of a sudden make Banque SYZ subject to personal jurisdiction
19 in this matter.

20 And I want to mention, Your Honor, Judge
21 Bernstein's decision in what we refer to as Fairfield 1,
22 which is the August 6th, 2018 decision. He ruled that the
23 Sentry investors, including Banque SYZ, which was a party to
24 that proceeding were not subject to personal -- specific
25 personal jurisdiction in New York in an action by their

1 counterparty, the Sentry fund itself, the party that Banque
2 SYZ had contracted with on account of their investments in
3 Sentry.

4 Said, the subscription agreement was not enough
5 and that was the agreement under which the investment was
6 made and was the basis -- I'm sorry, that was the basis on
7 which the investment was made.

8 And here, the Sentry Fund itself, through its
9 liquidators, the counterparty that Banque SYZ tried to sue
10 Banque SYZ in New York and Judge Bernstein said wait a
11 minute, your investment in Sentry through the subscription
12 agreement is not an inadequate basis for jurisdiction in New
13 York, for recovery of the redemption payments that Sentry
14 made to its investors. There would have to be another
15 basis.

16 If the -- Banque SYZ' counterparty could not sue
17 Banque SYZ in New York on personal jurisdiction on account
18 of those investments, how is it that Sentry's counterparty
19 in which BLM -- in which Banque SYZ had no connection or no
20 relationship. How could it sue, or through its Trustee sue
21 on personal jurisdiction in New York? So we think the
22 Fairfield 1 decision supports our argument.

23 Now, this complaint different from the Multi-
24 Strategy complaint --

25 THE COURT: Okay. Just let me mention one thing.

1 MR. LEVIN: Yeah.

2 THE COURT: We haven't determined personal
3 jurisdiction in Fairfield yet, so.

4 MR. LEVIN: Correct. What he has said is, that
5 the investment through the subscription agreement is not
6 adequate, there has to be some other basis.

7 THE COURT: Okay. Because that's an open issue in
8 Fairfield.

9 MR. LEVIN: Yes, it is. And my point here, Your
10 Honor, is simply to say that the BLI case which has been
11 argued back and forth, this seems contrary to that, because
12 the subscription agreement made clear through the offering
13 memorandum that the funds that Sentry received from its
14 investors would be invested in U.S. securities in New York.

15 So that fact was very much before Judge Bernstein
16 and he ruled that that was not enough. So at best, that --
17 and that is with full knowledge of the BLI decision and he
18 ruled that way anyway.

19 So we think that is -- and that -- we think that
20 is good law here and Banque SYZ was a party to that
21 proceeding. I know the Trustee wasn't, but Banque SYZ was
22 and we think that's the -- should be the law in this case.

23 THE COURT: We're talking about purposeful
24 availment, we're not talking about contract (indiscernible)
25 so.

1 MR. LEVIN: Well, the purposeful -- agreed,
2 agreed. The purposeful availment alleged here is the
3 contract. They use the contract to purposefully avail
4 themselves of investment in U.S. securities. But Banque SYZ
5 never invested in U.S. securities, it invested in Sentry.

6 You know, any -- you know, let's go back to my
7 broker at Charles Schwab. If I invest in -- let's say I'm a
8 foreign investor and I invest in a foreign mutual fund and
9 that foreign mutual fund signs up with Charles Schwab to
10 make investments and Schwab steals the money, that doesn't
11 mean the investors in that fund all of a sudden became
12 subject to U.S. jurisdiction simply because they knew that
13 their fund, or their company, their industrial company,
14 their financial company, whatever, would make investments in
15 the United States, even though they knew they would make
16 investments in the United States.

17 Now, the fraud, Madoff's fraud does not all of a
18 sudden bring Banque SYZ into the United States when it was
19 separated by Sentry, so.

20 THE COURT: As you've already said, that alone
21 maybe is not enough. Okay.

22 MR. LEVIN: Right, okay.

23 THE COURT: I heard you.

24 MR. LEVIN: Now, the complaint alleges one other
25 basis for personal -- specific personal jurisdiction over

1 Banque SYZ, that it opened the ISOS fund account at BLMIS.

2 That too is inadequate. Specific personal
3 jurisdiction relates only to the transaction that is the
4 subject of the litigation. The ISOS account was opened
5 after the transactions alleged in the complaint. You can't
6 retroactively create personal jurisdiction with respect to a
7 transaction.

8 And, in fact, the cases we cite make clear and the
9 Supreme Court has made clear, that you look at this on a
10 transaction by transaction basis, but there are two cases
11 that we cited involving -- the one case, two separate
12 contracts between the same counterparties. And the Court
13 looked at personal jurisdiction with respect to each
14 contract independently.

15 It didn't say, I mean, let's assume a
16 hypothetical. A New York party contracts with Swiss party
17 on contract A, and a little while later, contracts with
18 contract party -- I'm sorry, contracts in New York on
19 contract day and a little while later contracts in
20 Switzerland on contract B. And a dispute arises over
21 contract B.

22 The cases say that the New York courts would not
23 have specific personal jurisdiction with respect to contract
24 B which was all done in Switzerland, even though contract A
25 was done in New York by the same parties. And we cite the

1 cases to that effect. So that's one point.

2 And here the account was opened later, so it can't
3 relate back. And it's not enough to just say, oh, well,
4 this all relates to BLMIS, you know, it's all Madoff, and
5 therefore, it's the same thing. No, it's transaction by
6 transaction as those cases show.

7 Now, in addition, the papers show the allegations
8 are that Banque SYZ opened the account as an agent for ISOS
9 fund, not in its -- it used its name, but it used its name
10 as agent, it said the account state -- the account name is
11 Banque SYZ reference ISOS. And then it's filed with BLMIS,
12 an IRS form that says we are not opening this account in our
13 own name or opening it as an agent for a third party.

14 So the documents were clear about that. And that
15 too is another reason why the opening of the ISOS account is
16 not adequate for specific jurisdiction over the prior
17 initial and subsequent transfers alleged in the complaint.

18 So the Trustee says, ah, but Banque SYZ filed a
19 proof of claim in this case for ISOS. And the ISOS proof of
20 claim equally makes clear that it was filed as agent for
21 ISOS fund.

22 And as we explained in our memorandum, SIPA itself
23 and the SIPC rules say that where a party holds an account
24 as an agent, it is to be distinguished from any account in
25 its own name. And here it was clear that Banque SYZ was an

1 agent for ISOS fund and therefore should be distinguished.

2 So -- and that takes me to the last point which is
3 Count II of the complaint, Your Honor, the disallowance of
4 the ISOS claim. The Trustee makes no allegations of any
5 transfers to ISOS fund, makes no allegations of anything
6 wrong with the ISOS fund claim.

7 The only basis for disallowance of the claim is
8 502(b) based on transfers to its agent Banque SYZ and SIPA
9 and the SIPC rules as we cited make clear that that's not
10 enough, and therefore, the Count II should be dismissed and
11 the ISOS claim should be allowed.

12 Open to questions, Your Honor, otherwise I've
13 concluded.

14 THE COURT: I think I through them out as you were
15 going along.

16 MR. LEVIN: Great.

17 THE COURT: Mr. Cremona.

18 MR. CREMONA: Thank you, Your Honor. I guess it's
19 good afternoon at this point.

20 THE COURT: I guess we made it to that, yes.

21 MR. CREMONA: I intend to focus on defendant's
22 arguments made on reply and as stated here today, and also
23 to establish similar ground rules at the outset for
24 completeness of the record on the matter, I would
25 incorporate the arguments made by my colleague Mr. Feil

1 concerning 546(e) and its inapplicability to the instant
2 action, as he just argued in the Multi-Strategy case 12-
3 01205, as well as the plausibility of the Trustee's
4 allegations that the transfers in these cases are comprised
5 of stolen customer property.

6 I'll do my best, Your Honor, to supplement those
7 points, only to the extent that Mr. Levin has augmented his
8 colleague's points. Likewise, I would incorporate the
9 arguments and the relevant precedence argued by my colleague
10 Mr. Friedman concerning the appropriateness of this Court's
11 exercising personal jurisdiction over this defendant. And
12 will likewise do my best only to supplement those arguments
13 to the extent specific issues have been raised by Mr. Levin
14 and to address the specific facts of this case.

15 THE COURT: (indiscernible) you and Mr. Levin for
16 that, it actually keeps my mind a little clear, so I
17 appreciate that, thank you.

18 MR. CREMONA: Thank you, Your Honor. With that
19 background I will proceed.

20 Again, while your -- while the defendant today has
21 made many arguments in an effort to retain that stolen
22 customer property to the detriment of the net loser victims,
23 those arguments are belied by the plausible allegations in
24 the complaint, involve questions of fact that are not
25 appropriate for determination on a motion to dismiss, and in

1 any event, must be rejected as based on the law of this
2 case.

3 And I'll take the arguments in the order that Mr.
4 Levin just made them. First, the defendant maintains that
5 the Trustee has failed to plausibly allege the avoidability
6 of the initial transfers by incorporating the allegations
7 relating to Fairfield's actual knowledge, as alleged in the
8 Fairfield amended complaint, which is set forth at paragraph
9 63 in the complaint in this case.

10 The defendant argues that would violate Rule 10(c)
11 and Rule 8 and I would submit, Your Honor, that is wrong for
12 a number of reasons, including that the defendant expressly
13 conceded that point in multiple ways in his brief, and in
14 fact, just now we heard him rely on those same allegations
15 multiple times in his presentation.

16 And just briefly, Your Honor, as set forth in our
17 papers, the incorporation by reference is totally
18 appropriate under Rule 10(c), relying on the Geiger case,
19 which is at 446 B.R. 670. It's directly on point, despite
20 the arguments made in reply that permitted the incorporation
21 by reference under 10(c) of pleadings in a different
22 adversary proceeding within the same liquidation, because it
23 was under the umbrella of the debtor's bankruptcy case.

24 I would submit, Your Honor, the facts here are
25 identical. We have the umbrella of the SIPA liquidation and

1 multiple adversary proceedings within that case.

2 Next, Your Honor, again briefly we cited to the
3 district court's decision in the 550 consolidated proceeding
4 in our papers. And there, the district court already found
5 that incorporation by reference in the exact same manner,
6 mainly as set forth in paragraph 63 through 65 in the
7 instant complaint, was entirely appropriate when it reviewed
8 a nearly identical complaint and determined that Section
9 550(a) only requires the Trustee to show that the transfer
10 he seeks to recover is avoidable in each recovery action and
11 found sufficient the Trustee's incorporation by reference of
12 the then operating Fairfield complaint.

13 I would also point out that Banque SYZ
14 participated in that proceeding before the district court,
15 they're listed in the exhibit of all participating
16 defendants, which is at 12MC115 Docket No. 314 at entry No.
17 15 on page 10 of 15.

18 Despite defendant's participation in that
19 proceeding, it somehow challenges the application in effect
20 of that decision in their reply. They claim it doesn't
21 apply because it only was applied to a quote/unquote
22 representative case, which is at their reply on page 2.

23 However, the Court specifically noted that all the
24 participants to that proceeding were alleged to have
25 received avoidable transfers from Fairfield and Kingate just

1 like SYZ here, and the Court was determining whether the
2 Trustee had alleged -- adequately alleged the initial
3 transfers of Fairfield as avoidable based on the same
4 allegations incorporated here before the Trustee could
5 recover from the participating defendants there, like SYZ.

6 And so I would submit, Your Honor, that that
7 decision which is 501 B.R. 26 is law of the case and clearly
8 binding on this precedent, who participated in that
9 proceeding.

10 Moreover, regardless of the incorporation, Your
11 Honor, the Trustee submits that you can take judicial notice
12 of Your Honor's decision finding that the Fairfield second
13 amended complaint sufficiently alleges the avoidability of
14 the initial transfers.

15 That was previously determined by Your Honor at
16 2021 Westlaw 3477479. And I would point out, while Mr.
17 Levin in his reply tries to distinguish the cases that we
18 relied upon, our case here is even stronger.

19 And it's an important distinction that makes our
20 request stronger under the cases, is that we incorporated
21 the complaint at issue expressly by reference at paragraph
22 63 of the operative complaint.

23 And, you know, providing the defendants with the
24 requisite notice they claimed they didn't have. They've
25 been on notice of the incorporated allegations for over 11

1 years, since we filed our complaint in this action in May of
2 2011.

3 The other Courts were relying on permitted
4 incorporation on a different subsequent complaints, based on
5 requests after the fact, and still took judicial notice
6 generally pursuant to Federal Rule of Evidence 201(b).

7 So -- but again putting aside the appropriateness
8 of the incorporation, beyond what Mr. Levin conceded here
9 today on the record, I would refer Your Honor to his
10 declaration which is at ECF No. 151. As he said, it's his
11 declaration and request for judicial notice.

12 He specifically in that document requests that
13 this Court take judicial notice of the Fairfield amended
14 complaint and the second amended complaint at Exhibits B and
15 D respectively to his declaration. And he notes, quote, the
16 allegations in the complaint are incorporated by reference
17 in a complaint are assumed to be true for purposes of a
18 motion to dismiss under Rule 12(b)(6). That's ECF No. 151
19 at page 5.

20 So I find it interesting that Mr. Levin objects to
21 this Court's ability to take judicial notice of its own
22 decision finding that the trustee plausibly alleged
23 Fairfield's actual knowledge, while simultaneously asking
24 this Court to take judicial notice of the very same
25 complaint.

1 I submit, Your Honor, that the defendant cannot
2 maintain these contradictory positions. Likewise,
3 defendant's argument that it is unable to respond to the
4 allegations establishing Fairfield's actual knowledge as
5 incorporated by reference in the complaint herein is belied,
6 I would say again in the first instance by what Mr. Levin
7 said today in reciting those very same allegations, but also
8 by his acknowledgement in his reply that the allegations in
9 that complaint sufficiently allege the avoidability of the
10 initial transfers based on Fairfield's actual knowledge.

11 In his reply at page 2, he states, Banque SYZ does
12 not claim that the Fairfield amended complaint
13 insufficiently alleges avoidability of the initial transfers
14 and admits that the Court in Fairfield, quote, concluded
15 that the operative complaint alleged that the various
16 initial transferees, including Sentry, had actual knowledge
17 of BLMIS' fraud. That's at the reply at page 6.

18 Again, Your Honor, on the one hand defendant
19 claims it does not know which allegations concerning
20 Fairfield's actual knowledge have been incorporated and that
21 it must respond to, but at the same time, he can readily
22 ascertain from reviewing those same allegations that the
23 Trustee has plausibly alleged actual knowledge. Again, I
24 submit that the defendant cannot credibly maintain both
25 positions.

1 And for these reasons, I submit that the
2 incorporation of the Fairfield amended complaint by
3 reference is entirely appropriate and plausibly alleges the
4 avoidability of the initial transfers.

5 Unless Your Honor has any questions, I'll move on
6 to my next topic.

7 THE COURT: Please, go ahead, thank you.

8 MR. CREMONA: Next, Banque SYZ as we heard Mr.
9 Levin today assert that its good faith and value defenses
10 are established on the face of the complaint. They are not.

11 First, by their very nature affirmative defenses
12 under Section 550(b) are fact driven, requiring a factual
13 analysis and a presentation of evidence. That sort of
14 factual analysis is not appropriate at this stage of the
15 litigation, particularly with respect to a good faith
16 defense.

17 In their reply papers, again defendant -- they
18 first argue that its value defense under Section 550(b) is
19 established somehow in the face of the complaint. However,
20 as much as the defendant tries to avoid this Court's finding
21 in Your Honor's Fairfield decision, Your Honor previously
22 held, quote, as to whether the defendants gave value in the
23 form of surrendering shares in the Fairfield funds, such a
24 determination could not be made as a matter of law or fact
25 at this stage, end quote. That's at 2021 Westlaw 3477479 at

1 page 8.

2 Excuse me, Your Honor. Similarly, defendants
3 argue that its good faith defense has also been established
4 on the face of the complaint. That is also not the case.

5 The Trustee submitted a recent decision from the
6 district court, Picard v ABN Ambro which is at 20 CID 2586
7 and it was decided on May 2, 2022. We submitted that
8 supplemental authority, Your Honor, because it was issued
9 after the close of briefing in this matter. I submit to
10 Your Honor, this is dispositive of this good faith issue and
11 this affirmative defense.

12 In that case, as here, the appellees asked the
13 bankruptcy court to determine that the Section 550(b) good
14 faith defense appeared on the face of the complaint and
15 rendered the Trustee's claim subject to dismissal.

16 The district court held that a good faith -- that
17 the good faith -- excuse me, that good faith is an
18 affirmative defense, that the similarly situated defendants
19 bear the burden of proving and that the Second Circuit made
20 clear in its decision in Citibank that the inquiry notice
21 standard requires quote, a fact intensive inquiry to be
22 determined on a case by case basis which naturally takes
23 into account the disparate circumstances of differently
24 situated transferees. And they cited to Citibank.

25 The Court noted that such a fact based

1 determination can only be made on the entirety of the
2 factual record after discovery which has not occurred here,
3 noting that good faith inquiry notice -- the good faith
4 inquiry notice standard is difficult to resolve even at the
5 summary judgment stage, much less at the pleading stage.

6 So, Your Honor, for those reasons, I submit that
7 these defenses should be rejected as directly overruled and
8 the motion denied. Again, unless Your Honor has questions
9 on that, I'll move forward to the next affirmative defense.

10 THE COURT: Please, move forward.

11 MR. CREMONA: Next, Your Honor, Banque SYZ
12 asserted that its 546(e) defense is established on the face
13 of the complaint. And again, without reiterating all of the
14 arguments previously made, I think I will just try to hit
15 the highlights.

16 As we've said 546(e) by its expressed terms does
17 not apply. It applies to avoidance not recovery. As Mr.
18 Levin acknowledged, SYZ was a party to the Cohmad
19 consolidated proceeding and is bound by the ruling. I would
20 submit that Mr. Levin's reading of the ruling there in a
21 vacuum is just incorrect.

22 As my colleague Mr. Feil went through in detail
23 the second paragraph of that decision, the Court need not
24 get to because once the avoidability of the initial transfer
25 has been established based on the actual knowledge of the

1 initial transferee, that ends the inquiry.

2 And I think it's particularly important to point
3 out just briefly again, the Court in BNP, this Court
4 specifically addressed the very same argument as Mr. Feil
5 laid out. And somehow the defendants don't acknowledge that
6 the very same issue is before this Court and there the Court
7 denied the application of 546(e) and denied consideration of
8 the subsequent transferee's actual knowledge. And I would
9 submit the same outcome is appropriate here, Your Honor, and
10 that's based on the law of the case in the form of Cohmad
11 and BNP.

12 I'm just -- and then just moving forward, I think
13 the other aspects have been covered. Unless Your Honor has
14 specific questions, I will move on to customer property.

15 THE COURT: Great, thank you.

16 MR. CREMONA: Thank you, Your Honor.

17 So again, in SYZ's reply at page 10, SYZ
18 acknowledges that its central point is that the Trustee has
19 alleged billions of dollars more in subsequent transfers
20 than the initial transfers that -- and that somehow results
21 in the exhaustion of the customer property at issue in any
22 particular case and somehow in this case.

23 First of all, Your Honor, what the defendant is
24 asking you to do is beyond applying an incorrect pleading
25 burden, is also to look beyond the plausible allegations in

1 this complaint and consider voluminous materials beyond the
2 four corners of the complaint, including as Mr. Levin said
3 here today, approximately 80 -- the complaints in 80 other
4 actions and look to those pleadings to determine whether the
5 trustee's allegations in this case are plausible. And I
6 would refer Your Honor to -- that's Mr. Levin's declaration
7 at ECF 151 at Exhibit 1.

8 And that's simply inappropriate, Your Honor, on a
9 motion to dismiss because this Court is confined to the four
10 corners of this complaint to make that determination.

11 And in the first instance, this Court acknowledged
12 that the Trustee is entitled to sue multiple subsequent
13 transferees to recover the same customer property until he
14 has been fully satisfied.

15 The fact that the Trustee sued numerous defendants
16 to recover a portion of the same \$3 billion and the
17 aggregate demand amounts against those subsequent transfer
18 -- in those subsequent transfer of cases exceed that amount
19 is totally unremarkable and entirely consistent with the law
20 of this liquidation.

21 In fact, Your Honor acknowledged in your Fairfield
22 decision that quote, the Trustee may recover avoided
23 transfers from an initial transferee or a subsequent
24 transferee and need not seek recovery first from the initial
25 transferee.

1 And while recognizing that the Trustee is limited
2 by Section 550(d) to only a single satisfaction of an
3 avoided transfer, Your Honor noted that whether the Trustee
4 had been fully satisfied is an issue to be determined at a
5 later stage of this litigation. And that's Your Honor's
6 decision at 2021 Westlaw 3477479 at page 10.

7 Likewise, the Court in Merkin, this Court in
8 Merkin provided a similar illustrated example and that shows
9 that the -- that really shows that the defendant's charts
10 attached to Mr. Levin's declaration and all the arguments
11 about mathematical impossibility are irrelevant and
12 premature.

13 There, the Court stated an example and said, for
14 example, if an initial fraudulent transfer of \$1 is
15 subsequently transferred ten times from transferee one to
16 transferee two from two to three and three to four, et
17 cetera, the Trustee can sue each transferee for \$1. For
18 this reason, the aggregate subsequent transfer claim can
19 greatly exceed the amount of the initial transfer.

20 Nevertheless, the Trustee is entitled to only one
21 satisfaction under Section 550(d) and in the Court's example
22 can collect no more -- on account -- no more than \$1 on
23 account of the initial fraudulent transfer.

24 So, Your Honor, given that the complaint need only
25 plausible allege that some portion of the substantive

1 transfer is comprised of customer property, it is entirely
2 plausible and highly likely that the aggregate demand
3 amounts of all the subsequent transfer cases would exceed
4 the \$3 billion in initial transfers to the Fairfield Funds.

5 And that fact in no way supports defendant's
6 faulty logic that through simple arithmetic it can
7 demonstrate that the initial transfers were exhausted on the
8 face of any particular complaint.

9 In fact, in Merkin, even at an individual case
10 level, this Court could not engage in the mathematical
11 exercise that the defendant argues for here because it was
12 unnecessary. The Court reviewed certain transfers
13 identified in the complaint. And once it determined that a
14 portion of those subsequent transfers were funded with
15 customer property, that ended the inquiry. And the Court
16 denied the motion.

17 To be exact, Your Honor, of the nearly 290
18 subsequent transfers at issue in that case, the Court
19 actually focused and analyzed only a handful, less than ten,
20 to determine that the subsequent transfers at issue were
21 comprised of customer property.

22 What the Court did not do was to go on and
23 aggregate all the initial transfers and then determine
24 whether the total subsequent transfers exceeded the total
25 amount of initial transfers. And that's because the Trustee

1 met the standard there, just as he has done here.

2 And now, Your Honor, I would take us through the
3 complaint to demonstrate how the Trustee has met the
4 appropriate standard in this action and how he plausibly
5 alleged that approximately 15 million .9 -- excuse me, 15.
6 million -- \$9 million in subsequent transfers are comprised
7 of BLMIS customer property.

8 And just to be clear, the standard and his burden
9 to recover the subsequent transfers, as articulated by this
10 Court in Merkin, he must allege facts that support the
11 inference that the funds at issue originated with the debtor
12 and contained the necessary vital statistics, the who, when,
13 and how much of the purported transfers to establish an
14 entity as a subsequent transferee of the funds.

15 The Court also made clear that the complaint need
16 only support the inference that a portion of the subsequent
17 transfer originated with BLMIS. Like the instant case, the
18 Trustee is not required to connect each of the subsequent
19 transfers with an initial avoidable transfer emanating from
20 BLMIS or a prior subsequent transfer originating with the
21 initial transfer.

22 So, Your Honor, let's look at the complaint. The
23 complaint alleges that Banque SYZ received transfers
24 identified by date and amount from Sentry and that Sentry
25 invested substantially all of its funds with BLMIS. That's

1 stated in the complaint at paragraph 63 through 70, Exhibits
2 I, J and K.

3 The complaint likewise alleges that Banque SYZ
4 received transfers identified by date and amount from Sigma
5 and that Sigma invested all of its funds with Sentry and
6 that's at the complaint at paragraph 71 through 74, Exhibits
7 L and M.

8 So Mr. Levin directed Your Honor to his chart at
9 page 33. I'd like to take another look at that with Your
10 Honor and focus on it for a moment. And although it seeks
11 to show the implausibility of the Trustee's customer
12 property allegations, I submit it actually demonstrates how
13 the Trustee satisfies his burden.

14 It illustrates that the complete -- excuse me. It
15 illustrates that the complaint and its exhibits detail the
16 vital statistics and the relevant pathways through which
17 customer property flowed from BLMIS to Sentry and ultimately
18 to the defendant.

19 If you look at the first column it details the
20 dates and amounts totaling \$1.315 million that BLMIS
21 transferred to Sentry between May 2003 and March of 2007.
22 And the dates and the amounts of approximately \$15.5 million
23 Sentry transferred to the defendant.

24 It clearly shows that the Trustee has alleged that
25 at least some portion of the subsequent transfers Banque SYZ

1 received originated with BLMIS. For example, the May 15,
2 2006 transfer to defendant in an amount of \$332,185 occurred
3 shortly after Sentry received a \$120 million transfer from
4 BLMIS on April 13th, 2006.

5 Now, I submit, Your Honor, while it is not
6 required at this stage of the case and is beyond what the
7 Trustee is required to plead, the linkage that the defendant
8 claims is so vital to the Trustee's case and lacking in
9 their view on the face of the complaint, is readily apparent
10 based on defendant's own illustration of what is stated in
11 the complaint.

12 It is certainly plausible that some portion of the
13 \$120 million transfer from BLMIS to Sentry funded the
14 \$332,000 transfer from Sentry to SYZ just over 30 days
15 later. And, Your Honor, I would submit that alone is reason
16 to deny defendant's motion to dismiss on this point.

17 Unless Your Honor has questions on -- actually,
18 Your Honor, I apologize, I'd just like to rebut something
19 about what Mr. Levin talked about having the documents in
20 our possession and that somehow, you know, we are prejudiced
21 or our claims should be enhanced.

22 That is not the case. We -- as my colleague Mr.
23 Feil said, we do not have all the documents and what is --
24 the exercise that is ultimately going to be required here is
25 well beyond just reviewing that, bank documents, it goes

1 beyond that the Trustee does not have anywhere near complete
2 set of the Fairfield bank records.

3 In addition, the ultimate tracing will involve the
4 relationship between the parties. We'll rely on records
5 showing SYZ's course of business and how redemptions went
6 from Sentry to SYZ and records which will be produced in
7 discovery. Those are some of the -- I mean, those are some
8 of the gaps that we have and I just wanted to point that out
9 since we've heard repeatedly today that the Trustee has all
10 the documents it needs to, you know, engage in the tracing
11 exercise, which is inappropriate at this stage in any event.

12 Unless Your Honor has further questions on
13 customer property, I'll move on to the final point which is
14 personal jurisdiction.

15 THE COURT: Please, go right ahead. Thank you.

16 MR. CREMONA: Thank you, Your Honor.

17 Your Honor, I submit that it is appropriate and
18 reasonable for this Court to exercise personal jurisdiction
19 over this defendant based on its extensive contacts with
20 this forum, and purposeful availment of the benefits and
21 protection of this jurisdiction, which contacts this Court
22 has previously held sufficient for purposes of personal
23 jurisdiction.

24 Once more here, this defendant opened an account
25 with BLMIS for purposes of directly investing with Madoff in

1 New York and did invest with BLMIS for a period of nearly
2 two years, from March of '07 through December of '08.

3 SYZ then subsequently filed a customer claim
4 related to that direct account and participated in this
5 liquidation proceeding in an effort to recoup asserted
6 losses based on its direct investment with BLMIS, each of
7 which provides this Court with an independent basis to
8 exercise jurisdiction over the defendant beyond the usual
9 minimal contacts that have alone been sufficient under this
10 Court's holding in BLI.

11 So although we've discussed it a fair amount
12 today, I would just briefly, Your Honor, I would like to
13 start with the guiding principles enunciated by Judge
14 Lifland in BLI, where he appropriate -- he appropriately
15 exercised personal jurisdiction over a Fairfield investor
16 under the identical facts to the case here.

17 So Judge Lifland focused on the following facts.
18 BLI signed the subscription agreement with Fairfield that
19 expressly incorporated a private placement memorandum that
20 highlighted the following, the prominent role of New York
21 based BLMIS' investment strategy, that BLMIS would retain
22 custody of at least 95 percent of the funds' assets in the
23 United States, the parties agreed to New York choice of law
24 in forum selection clauses.

25 The agreement required that all subscription

1 payments from BLI to Fairfield pass through Fairfield's New
2 York account at HSBC and that BLI's redemption payments from
3 Fairfield were processed through its own New York bank
4 account.

5 So on the basis of the foregoing facts, all of
6 which are present in this case, Judge Lifland held that
7 jurisdiction was appropriate because BLI purposefully
8 availed itself to the benefits and protections of New York,
9 New York laws by knowing, intending and contemplating that
10 the substantial majority of funds invested in Fairfield
11 would be transferred to BLMIS in New York to be invested in
12 New York in the securities market.

13 So, Your Honor, I submit that the facts of the
14 instant case dictate the exact same result. And while that
15 is enough, I would like to point out some additional bases
16 in our complaint.

17 As stated in paragraphs 38 -- excuse me, as stated
18 in paragraphs 7 and 38 of the complaint SYZ opened and
19 maintained a direct account with BLMIS. That's account
20 number 1FR126 and used New York banks to transfer funds into
21 and receive monies from BLMIS, including the BLMIS 703
22 account at JPMorgan Chase.

23 In addition, paragraph 24 of the complaint states
24 that Banque SYZ executed the customer agreement and all
25 necessary account opening documents for purposes of its

1 account with BLMIS and delivered those documents to the head
2 -- to the New York headquarters.

3 And just before I move on, Your Honor, I want to
4 rebut something that Mr. Levin said. You know, he talked
5 about extra complaint allegations and all sorts of documents
6 that were attached to our papers beyond the complaint.
7 However, as we cited in our papers it is entirely
8 appropriate for a plaintiff to establish a prima facie case
9 of jurisdiction through affidavits and supporting materials
10 that contain averments of facts outside the pleadings.

11 We cited to a Second Circuit case, 624 F3d 123,
12 these pleadings and affidavits are to be construed in the
13 light most favorable to the plaintiff, resolving all doubts
14 in plaintiff's favor. Again that's the Queen Bee case,
15 Second Circuit, 616 F3d 158.

16 I would also point that Judge Lifland found
17 exactly the same in BLI when he noted that a Court may
18 resolve disputed jurisdictional facts -- excuse me, the
19 Court may resolve disputed jurisdictional fact issues by
20 reference to evidence outside the pleading, such as
21 affidavits and consider all pertinent documentation
22 submitted by the parties. And that's BLI, 480 B.R. at 510.

23 And with that, Your Honor, I'll walk through some
24 of the documents that are attached to my declaration, which
25 establish that it was SYZ that opened the account.

1 In addition to the allegations at -- my
2 declaration at ECF 164, Exhibit 12, as I said make quite
3 clear that SYZ opened the account on its own behalf. As
4 you'll see at Exhibit 12, all of the account opening
5 documents were signed by Banque SYZ, including the customer
6 agreement with absolutely no reference to ISOS.

7 Every related account statement was addressed to
8 SYZ with no reference to ISOS for the entire duration of the
9 account. In the BLMIS customer agreement, which was signed
10 by SYZ, Banque SYZ represented that no other person or
11 entity had an interest in the customer account.

12 BLMIS only communicated with Eric Syz and other
13 Banque SYZ representatives regarding the customer account,
14 and SYZ representative, not ISOS directed the wire transfers
15 into the customer accounts, asked questions regarding
16 purported trades on the statements, and trade confirmations,
17 and all -- and signed all the trading authorizations.

18 I would also just like to rebut something we heard
19 from Mr. Levin. He referenced the IRS form that was
20 attached to his declaration. You know, we heard him talk
21 about how that demonstrates that SYZ was acting as an
22 intermediary and not on its own behalf. And that somehow
23 negates all the documentation that I just recited and which
24 was in the customer account file with BLMIS.

25 He quotes from this form and he did earlier in his

1 presentation. To that effect, Your Honor, it is not clear
2 to me what this form even shows, but what is clear, is what
3 it doesn't show.

4 The form is mainly blank and does not list the
5 relevant account as its supposed to in line 8. No where is
6 SYZ's quote/unquote disclosed principal mentioned in this
7 form, and if anything, all it possibly creates is an issue
8 of fact that can only be resolved after discovery, such as
9 who had dominion and control over the funds.

10 There are just a number of issues. But what's
11 most important, the Trustee when reviewing the debtor's
12 books and records would have no way to know that based on --
13 that this somehow created an account relationship or a
14 customer relationship. He would have no way to know that
15 when he determined that SYZ was the customer under SIPA.

16 And I would also like to address this agency
17 argument that is now being espoused by Mr. Levin here today.
18 And really for the first time on reply. No such agency
19 argument was made in the motion.

20 SYZ mentioned only that, quote, it opened the
21 account for ISOS with BLMIS on or around March 7, 2007 and
22 that's at the motion at page 38. And that SYZ opened the
23 BLMIS account in a custodial capacity for its customer ISOS.

24 For the first time on reply, SYZ contends that it
25 acted as an agent for ISOS when it filed the claim and it

1 opened the BLMIS account in its own name, devoting three
2 pages to the point in its reply at page 14 through 16, now
3 claiming their relationship is quote/unquote agency in a
4 nutshell. None of this was in the motion to dismiss, Your
5 Honor.

6 So in the first instance, I would ask Your Honor
7 to disregard this argument in its entirety because it was
8 asserted for the first time on reply. And if Your Honor is
9 inclined I'm happy to provide some authority that argument
10 is first raised in the reply, should not be properly
11 considered, since this is the first time we've had an
12 opportunity to respond to it.

13 THE COURT: Mr. Levin, what say you?

14 MR. LEVIN: Your Honor, I would have to go through
15 on the fly right now, and detail the Trustee's allegations
16 on jurisdiction in his opposition. He's -- this argument
17 about agency was made specifically in reply to the Trustee's
18 allegation about who the customer was in this account.

19 And we said the documents that Mr. Cremona
20 submitted made clear that it is an agency account. And
21 therefore, I think it is proper in the reply, it's not like
22 we just made this up. We came to this late.

23 We made the arguments we did on jurisdiction in
24 the initial proceeding. Again, I'm going to have to --

25 THE COURT: Mr. Cremona, I'll tell you what, we're

1 going to make it very narrow. You file your brief on the
2 very, very narrow issue of the ones which you think he --
3 that Mr. Levin brought up today, and Mr. Levin, then you
4 reply to that.

5 MR. LEVIN: Thank you, Your Honor.

6 THE COURT: So --

7 MR. LEVIN: (indiscernible) for that?

8 MR. CREMONA: I mean, Your Honor, I -- Your Honor,
9 I'm also happy to respond as well on the agency point and I
10 have authority to that effect which I can do right now as
11 well.

12 THE COURT: Five pages each. Make it short and
13 simple.

14 MR. LEVIN: Yeah, Your Honor, I think what you
15 were referring to was the agency point which Mr. Cremona is
16 addressing. Was there something else that Mr. Cremona --

17 THE COURT: Mr. Cremona, are we missing something?

18 MR. CREMONA: Well, Your Honor, I was -- what I
19 said is I'd be inclined to provide you with the authority on
20 agency as well that it's premature and inappropriate on a
21 motion to dismiss, which I'm happy to do right now.

22 THE COURT: No, I thought we were only dealing
23 with what Mr. -- I thought the only thing we were dealing in
24 right now and, Mr. Levin, I heard you, but we're dealing
25 with supposedly you brought up a defense in oral argument

1 and Mr. Cremona says that I shouldn't be ruling on that or
2 not ruling on it, it shouldn't be allowed. It was a very
3 narrow issue. Mr. Cremona --

4 MR. CREMONA: Sure.

5 THE COURT: -- am I right?

6 MR. CREMONA: Just to be clear, Your Honor, and I
7 don't want to confuse matters. What I'm saying is, in Mr.
8 Levin -- in the defendant's motion to dismiss they made
9 perhaps two line references to a purported agency
10 relationship, they never made an argument that they were the
11 agent. They said they were -- they filed -- they did --

12 THE COURT: You were making a legal argument about
13 something, so I don't need to go into that detail. I just
14 want the memo on the legal arguments you made, and Mr.
15 Levin, your response to that legal argument. You can point
16 to it and do you need memos on it? Is this with ISO?

17 MR. CREMONA: It is, yes, Your Honor, and I guess
18 the specific narrow issue is whether or not it's appropriate
19 to consider an argument that was raised for the first time
20 on reply.

21 MR. LEVIN: Your Honor, I'm trying to understand
22 here whether --

23 THE COURT: I am too because let me tell you, Mr.
24 Levin, I'm really wanting to get this opinion out. We've
25 got so many more in the queue, I want to get this one out

1 quickly.

2 MR. CREMONA: Your Honor, I'm happy to move
3 forward.

4 THE COURT: Okay.

5 MR. CREMONA: I think I'd just like to make my
6 next point which I think resolves the issue.

7 THE COURT: Okay.

8 MR. CREMONA: So even if the Court was inclined to
9 consider defendant's agency argument which are beyond the
10 allegations in the complaint, I think they should be
11 disregarded in any event, because the scope of an agency
12 relationship is a question not properly resolvable on a
13 motion to dismiss. That's a fact intensive inquiry and
14 that's clear in the law in this circuit.

15 THE COURT: Okay. Let's leave it there then. I
16 don't want memos.

17 MR. CREMONA: Understood. Thank you, Your Honor.
18 So with that, I would conclude this by saying, SYZ's direct
19 account and investment with BLMIS provides yet another
20 significant contact and conduct establishing a clear New
21 York nexus in favor of this Court exercising personal
22 jurisdiction over this defendant.

23 And there is one final independent basis for
24 jurisdiction here. That is, Your Honor, that SYZ filed the
25 customer claim on its own behalf. And looking to the

1 complaint, the complaint adequately pled that SYZ filed the
2 customer claim in the SIPA proceeding seeking to recover
3 funds it allegedly lost on its investment in BLMIS, which
4 has not been -- yet been determined, whereby it submitted to
5 this Court's jurisdiction. And that's alleged at paragraph
6 883 and 93 of the complaint.

7 And what I would say, Your Honor, is that SYZ's
8 reliance on the claim form itself does nothing to undermine
9 these well pleaded allegations. The fact remains that the
10 end notes in the claim form do not change that the claim was
11 signed by SYZ and filed on its behalf, nor does it
12 retroactively change the account opening documents and all
13 the course of dealing directly with BLMIS as the direct
14 account holder, the very account the claim relates to.

15 The filing of that claim and SYZ's active
16 participation in the claims process seeking the benefit from
17 the Trustee's recoveries in this liquidation most certainly
18 confer this Court with jurisdiction on that independent
19 basis.

20 That claim remains outstanding and will be
21 appropriately resolved within this adversary proceeding
22 pursuant to the 502(d) count.

23 And just to rebut something that Mr. Levin said
24 that somehow the claim does not relate to this adversary
25 proceeding, it most certainly does. The claimant is SYZ, by

1 operation of law, 502(d) applies to that and it will be
2 resolved as part of this adversary proceeding.

3 And as a result, by the way, that confers this
4 Court with final adjudicated authority over the action under
5 the principles of Katchen v Landy and the other related
6 cases cited in our papers.

7 Lastly, Your Honor, I would just turn to the
8 plausibility of the allegations regarding the 502(d) count.
9 The complaint plausibly alleges that Banque SYZ filed the
10 customer claim on its account and received stolen customer
11 property, therefore, the customer claim must be denied
12 pursuant to 502(d).

13 Again, looking at the complaint, the Trustee
14 adequately pled that the customer claim should be
15 temporarily disallowed pursuant to 502(d) at paragraphs 83
16 and 93 through 94. And having alleged that SYZ is the
17 customer with a direct account with BLMIS, that it filed the
18 related claim for its own account is the recipient of
19 avoidable and recoverable transfers of customer property.
20 And has yet to return those transfers to the Trustee, it
21 follows that the claim must be disallowed as a matter of
22 law.

23 For all those reasons, Your Honor, Banque SYZ's
24 motion to dismiss Count II should be denied and the customer
25 claims should be disallowed.

1 THE COURT: Very good. Mr. Levin.

2 MR. LEVIN: Thank you, Your Honor. And I'd like
3 to start where Mr. Cremona did on a point of personal
4 privilege, with his remark that I was making arguments so
5 that my client could retain stolen customer property. I
6 don't think that's quite appropriate in a court like this
7 and I'll move on.

8 THE COURT: It was an editorial comment and I
9 know, so move on.

10 MR. LEVIN: First, he says -- I'll take the
11 arguments in the order he gave them. He said that we
12 conceded that incorporation by reference was appropriate in
13 this case because several of our arguments with affirmative
14 defenses relied on the allegations of the Fairfield amended
15 complaint.

16 But in fact, on page 15 of our motion, if I can
17 turn to that, on page 15 of our motion we specifically said
18 if this Court denies our motion with respect to Rule 8(a)
19 and 10(c) then we will address what's in the Fairfield
20 amended complaint. That's on 15 to 16. So we have not
21 conceded that it is appropriate.

22 Second, Mr. Cremona relied on the Geiger case,
23 which we both cited in our papers, saying that the
24 incorporation by reference from one adversary proceeding to
25 another adversary proceeding was appropriate.

1 We disagree with that ruling but we understand
2 that. But the important point here is even if the Court
3 were to accept that position, Geiger struck the
4 incorporation by reference because the incorporated
5 complaint did not contain a short and plain statement of the
6 grounds entitling the plaintiff to relief.

7 So I'm happy to have him rely on Geiger, because
8 that's exactly the facts of this case. He says the district
9 court found that incorporation by reference was appropriate,
10 we addressed that in our papers. I'm not going to go over
11 it in detail.

12 He says that the judicial notice of a decision is
13 appropriate. Sure. But it's not what they're alleging.
14 It's -- they're trying to say that the Court decided
15 something and therefore that's our allegation, but it's not
16 in the complaint. So, you know, we address that in our
17 papers.

18 And I never claimed that the Trustee has not
19 alleged actual knowledge by Sentry. I recognize the Court's
20 decision in the Fairfield Investment Fund case, that the
21 Court held that the Fairfield second amended complaint, not
22 the first one that's incorporated in ours, but that's okay,
23 I'll give a little -- I have a little give on that one.

24 But the second amended complaint adequately
25 alleged actual knowledge. I'm not challenging that here.

1 So I don't know where Mr. Cremona got that statement from.

2 That's -- let me move on to Section 550(b), the
3 good faith defense. He says that a fact driven issue, but
4 as I pointed out, the Citibank decision makes that purely a
5 hypothetical case. And to the extent that Judge McMahon's
6 opinion in BNP suggests otherwise, it doesn't really grapple
7 with the issue, instead falling back on what we would
8 consider a more common pre-Citibank understanding of the
9 term good faith, which looks at what the defendant might or
10 might not have known or thought.

11 Moving on to 546(e). Let's see. There are -- if
12 you look at the potential actual knowledge of an initial
13 transferee and a subsequent transferee, there are four
14 possibilities of actual knowledge that Madoff wasn't traded
15 securities.

16 Initial transferee knew, subsequent transferee
17 knew. Initial transferee knew, subsequent transferee didn't
18 know. Subsequent transferee knew, initial transferee didn't
19 know. You know, you can make a matrix of these.

20 Judge Rakoff addressed only the initial transferee
21 knew whether or not the subsequent -- I'm sorry. The
22 initial transferee knew and the subsequent transferee knew
23 and he addressed initial transferee was innocent and
24 subsequent transferee knew.

25 He didn't address the initial transferee knew and

1 subsequent transferee did not know. But all the language in
2 his complaint -- in his opinion suggests that the protected
3 securities market that transaction should be protected and
4 that's what we've got here.

5 I also pointed about the -- okay. Nothing further
6 on that.

7 Customer property. Mr. Cremona said that our
8 argument on this should be confined to the four corners of
9 the complaint. Of course, when it comes to the
10 incorporation by reference, he says that Geiger says that
11 the entire SIPA proceeding is one proceeding. And the Court
12 can look at everything within that proceeding.

13 And if that's the case, the Court may indeed look
14 at the 70 some other complaints and we noted those, we
15 attached those in our request for judicial notice as to what
16 the Trustee had alleged.

17 He says that Judge Bernstein looked at the
18 possibility of \$1 being transferred to subsequent transferee
19 A, subsequent transferee B, subsequent transferee C and so
20 on up to ten subsequent transferees and the Trustee could
21 sue each one. That's not this fact, that's not this case.

22 This case is the \$1 transferred to the initial
23 transferee -- the initial transferee. And then subsequent
24 transferee at that same point in time transferring \$10 to
25 ten different subsequent transferees, they can't all have

1 received customer property. It's not a chain. It was a
2 simultaneous -- or it's not simultaneous. It was -- in some
3 cases it was simultaneous. In others, it was more like
4 transferred to multiple subsequent transferees not in a
5 chain with each other.

6 He noted that the Sentry offering memorandum, said
7 that it invested all of its Sentry funds with Madoff and
8 therefore anything that Sentry paid out to its investors
9 must have been customer property.

10 Well, there's a logical fallacy in that. Sentry -
11 - because Sentry was going to take money that it received
12 and invested with customer property, that doesn't mean that
13 it didn't get any money from other -- I'm sorry. That it
14 didn't get money from other sources besides withdrawals from
15 Madoff.

16 And we show in our papers, it can't be that it
17 received 2.9 million -- billion from Madoff and paid out 7
18 billion to others and all of that \$7 billion was 2.9. That
19 is, you know, spinning gold out of straw. It just can't be.

20 Mr. Cremona focused on our March 20, '07 transfer.
21 Admittedly that was right after a transfer from BLMIS to
22 Sentry. Our main focus here was on the transfer of the
23 \$13.5 or so million nine months after the last prior initial
24 transfer, and the Court shouldn't be distracted by that
25 small subsequent transfer when the real focus is on the

1 large earlier transfer.

2 Finally on jurisdiction. Mr. Cremona keeps
3 stressing Banque SYZ's direct investment with Madoff. When
4 the papers show that it was investing as agent. All I can
5 suggest is if I were the -- an officer of a corporation and
6 the corporation opened an account and I signed all the
7 documents, I would be the agent of that corporation, but
8 that doesn't mean it's my account.

9 SYZ itself was the agent of ISOS and made that
10 clear in Madoff's documents, both in the document cited in
11 Mr. Cremona's declaration, the -- where the -- how the
12 account name should read when it was opened.

13 I apologize, I had that in front of me, that's on
14 page -- that's Exhibit 11, page 8 and 10 of his declaration,
15 Exhibit 11, pages 8 and 10. And then in the proof of claim
16 it was clear that SYZ was filing it as an agent.

17 We're not talking about the scope of the agency
18 relationship here. It's not whether the agent had -- scope
19 of agency usually has to do with whether the agent had
20 authority to enter into whatever transaction. There's no
21 dispute here that Banque SYZ had authority to enter into
22 this transaction for ISOS.

23 But it did so as an agent and that does not
24 subject SYZ to personal jurisdiction for things that
25 occurred months and years prior because they were part of

1 the same transaction. Nor does it make 502(d) applicable.

2 I searched long and hard, Your Honor, for a case
3 in which an agent had received a voidable transfer and his
4 principal had filed a claim against the debtor. That's the
5 facts of this case. I could not find one.

6 But 502(d) talks about whether the avoidable
7 transfer was returned by the recipient and a proof of claim
8 by that recipient, by the claimant, here the claimant is
9 ISOS filed by its agent Banque SYZ.

10 Finally, on the affidavits outside the pleadings,
11 yes, of course, courts can look to documents outside the
12 pleadings to determine jurisdiction, but not, not where the
13 complaint simply alleges in conclusory terms the Court has
14 personal jurisdiction over the defendant period or the
15 defendant purposefully availed itself of the United States
16 or with investment in the United States period. And now
17 let's use that as a wedge to open up discovery and put in a
18 lot of additional material. The complaint itself must be
19 plausible and set forth a plausible basis for jurisdiction.

20 Nothing further, Your Honor, unless you have any
21 questions.

22 THE COURT: No, I do not. Mr. Cremona, anything
23 you wish to add that is put only on what was just addressed
24 by Mr. Levin?

25 MR. CREMONA: Your Honor, I'll be extremely brief.

1 One, on the Geiger case, those limitations that Mr. Levin
2 just referred to do not apply. There were two aspects of
3 that incorporation, one was a motion that was attempted to
4 be incorporated and one was the complaint for declaratory
5 judgment and that complaint was incorporated.

6 Second, my understanding of the law, you know, Mr.
7 Levin's request to incorporate by reference, 80 other
8 complaints is not appropriate. The face of the complaint is
9 what governs here. What we did is by expressly referencing
10 one complaint in paragraph 63, that is appropriate and
11 that's a big distinction.

12 The point about the account was opened for ISOS,
13 nothing in the documentation shows that. There was one REF
14 ISOS, I would submit to Your Honor that that does not negate
15 the 12 to 18 months of statements that show who the account
16 holder was, and that no where in the documentation is ISOS
17 referenced.

18 And the last point on the claim, you simply cannot
19 rewrite history by filing a proof of claim and you did so
20 claiming on an agent, or that that person was the customer.
21 The customer is determined as Your Honor knows, as we cited
22 in our cases by the Morgan Kennedy factors, the Kruse case,
23 Aozora, whether or not the person entrusted cash or
24 securities with the broker dealer for the purpose of
25 purchasing securities, ISOS never did that, SYZ did that,

1 SYZ is the customer. That's all I have, thank you.

2 THE COURT: Thank you. Thank y'all very much. I
3 enjoy -- I enjoy y'all very much. I will issue a written
4 decision and have a good day.

5 MR. CREMONA: Thank you, Your Honor.

6 MR. LEVIN: Thank you, Your Honor.

7 THE COURT: Thanks, everyone.

8 (Proceedings concluded at 1:21 p.m.)

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CERTIFICATION

I, Sheila G. Orms, certify that the foregoing is a
correct transcript from the official electronic sound
recording of the proceedings in the above-entitled matter.



Signature of Approved Transcriber

Dated: May 26, 2022

VERITEXT

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